



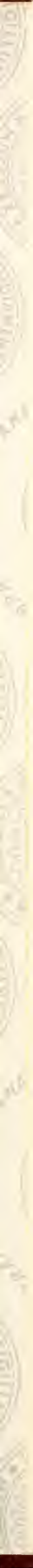
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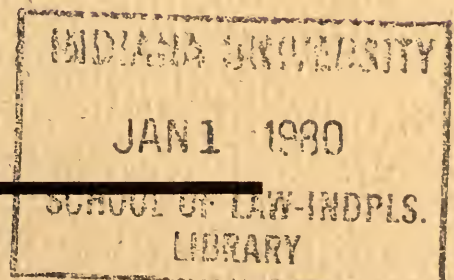
Indiana Law Review

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Dedication: On The Appointment of Dean Frank T. Read
The Honorable Robert E. Lavender

1979 Survey of Recent Developments in Indiana Law

- I. Foreword: Indiana Taxation**
- II. Administrative Law**
- III. Civil Procedure and Jurisdiction**
- IV. Constitutional Law**
- V. Contracts, Commercial Law, and Consumer Law**
- VI. Corporations**
- VII. Criminal Law and Procedure**
- VIII. Domestic Relations**
- IX. Evidence**
- X. Insurance**
- XI. Labor Law**
- XII. Products Liability**
- XIII. Professional Responsibility**
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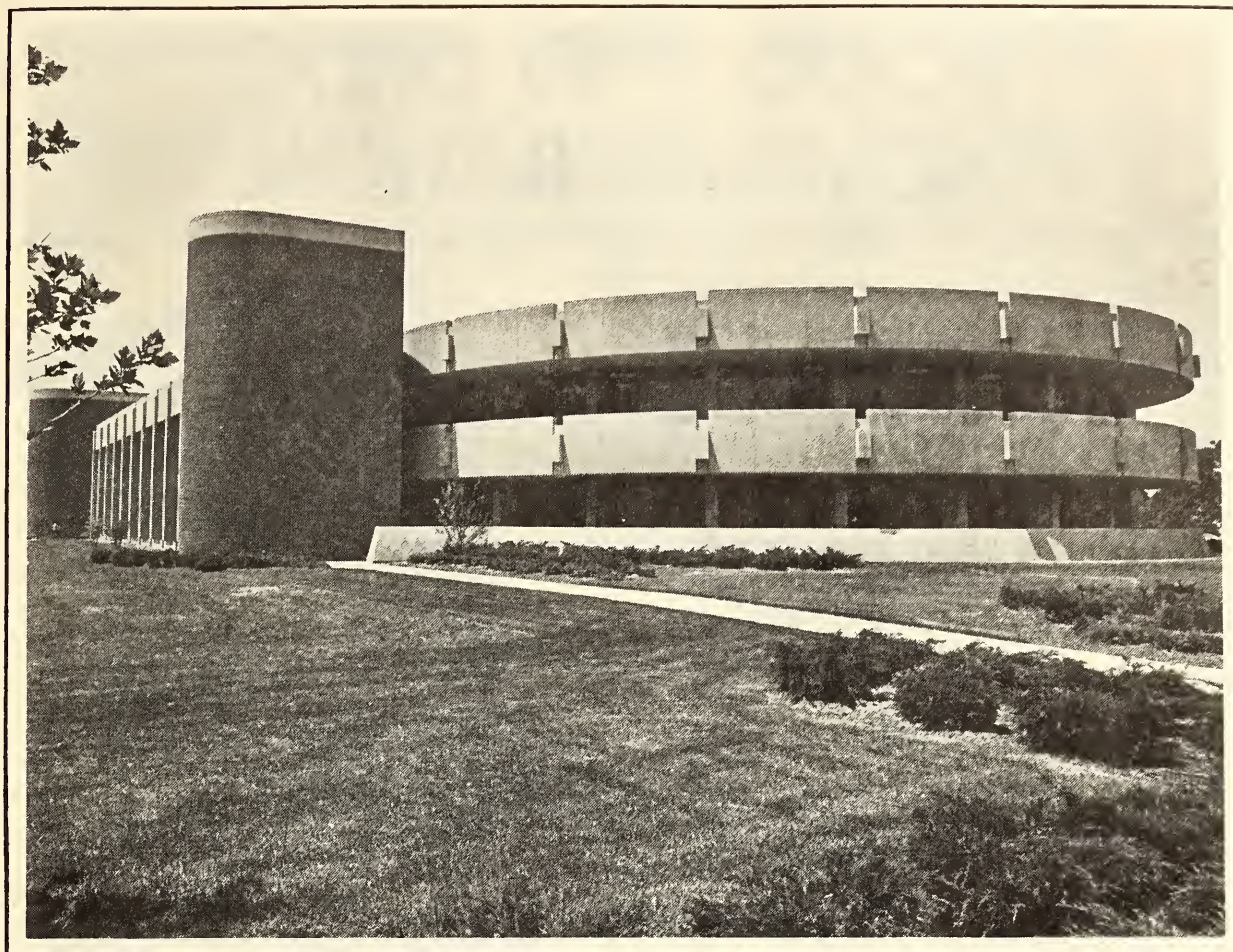


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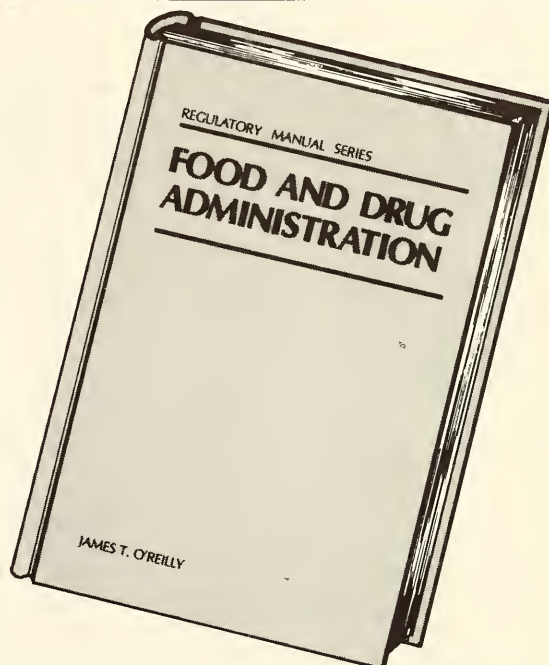
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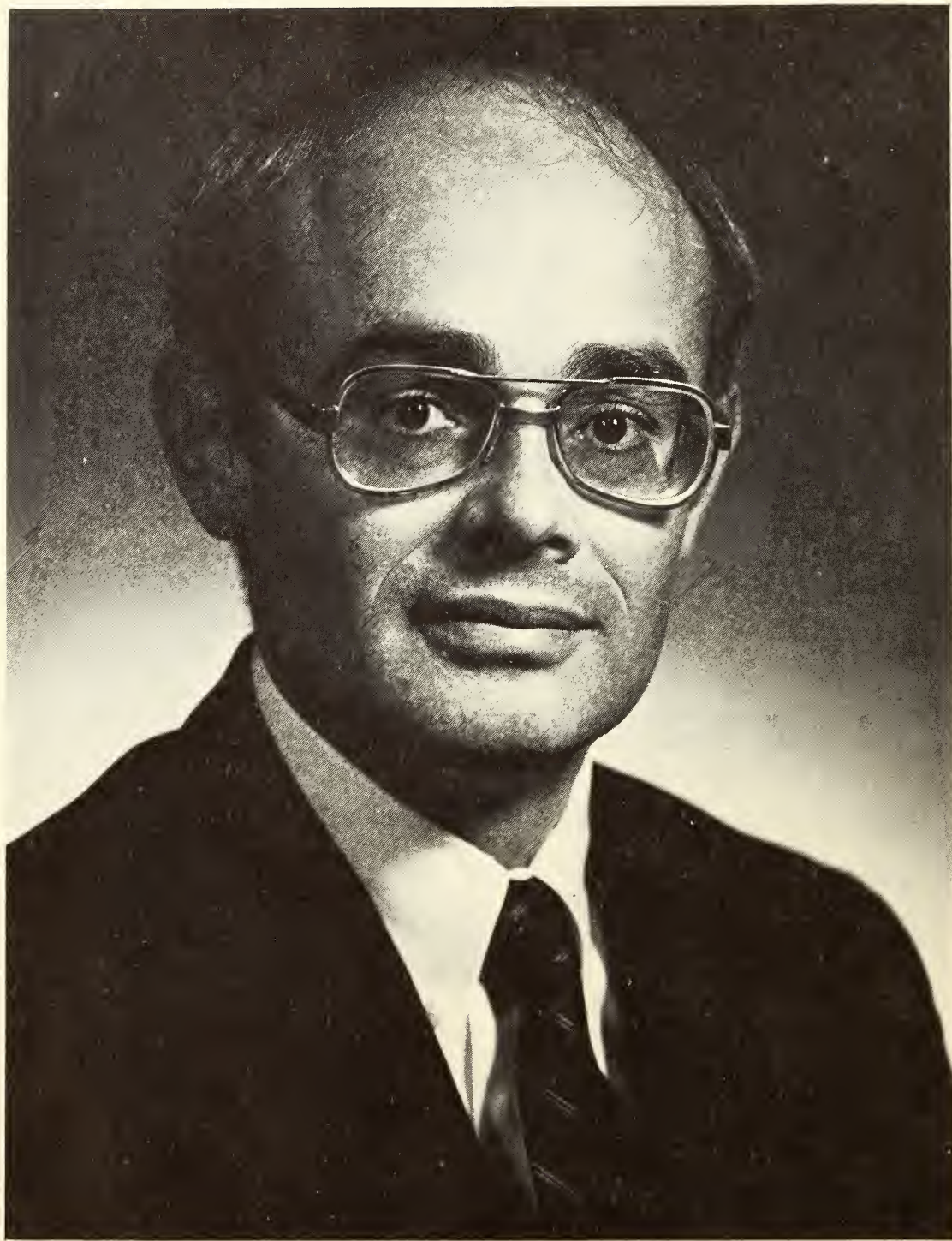
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FRANK T. READ

**IN HONOR OF DEAN FRANK T. READ,
THE NEW DEAN OF THE
INDIANA UNIVERSITY
SCHOOL OF LAW—INDIANAPOLIS**

It is a pleasure to write this article dedicating this issue of the *Indiana Law Review* to my good friend Frank T. Read, the new Dean of the Indiana University School of Law—Indianapolis and formerly the Dean of the University of Tulsa School of Law.

The first time I met Frank was soon after he had assumed the duties as Dean of the University of Tulsa School of Law. He was speaking to a luncheon meeting of Tulsa's alumni of which I am a member. I was greatly impressed with the Dean's energy and enthusiasm to make our school a leading law school in this region. In my opinion he has succeeded. From my observation of him and in discussing the school and its administration with others interested in the Law School at Tulsa University, Dean Read impressed all of us with his ability as both an educator and an administrator. The University of Tulsa School of Law is much better for his leadership. He will be sorely missed.

In addition to his work as Dean at Tulsa University, Frank devoted himself extensively to the continuing education of Oklahoma's lawyers and judges by his writings on law matters and lecturing at various seminars conducted under the CLE program sponsored by the Oklahoma Bar Association. He will be missed in the future efforts of the bar to keep sharp the skills of our practicing attorneys and sitting judges.

We of the Oklahoma bench and bar are grateful for having had Frank Read in our midst during the time he spent here in Oklahoma and he knows that he goes to Indiana with our most fond wishes and hope for his continued success. I know he will make a fine Dean at the Indiana University School of Law—Indianapolis.

ROBERT E. LAVENDER
Chief Justice of the Oklahoma
Supreme Court

Indiana Law Review

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Number 1

Survey of Recent Developments in Indiana Law

The Board of Editors of the *Indiana Law Review* is pleased to publish its seventh annual Survey of Recent Developments in Indiana Law. This survey covers the period from June 1, 1978, through May 31, 1979. It combines a scholarly and practical approach in emphasizing recent developments in Indiana case and statutory law. Selected federal case and statutory developments are also included. No attempt has been made to include all developments arising during the survey period or to analyze exhaustively those developments that are included.

I. Foreword: Indiana Taxation

*Marc S. Weinstein**

Taxation in the state of Indiana is necessarily a broad and complex subject, encompassing not only the various taxes levied by the state, but also numerous rules governing collection, appeal, and other procedural matters. The purpose of this article is to provide a comprehensive overview of the history and operation of the Indiana Department of Revenue and the State Board of Commissioners, to explain the various taxes administered by each agency, and to survey recent legislative and judicial developments in the area.

A. Department of Revenue

1. *Introduction.*—The Indiana Department of Revenue was created in 1947 by an act of the legislature which consolidated the operations of the gross income tax division, inheritance tax division, motor fuel tax division, intangibles tax division and store licenses.¹

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The author wishes to thank William L. Tracy, Administrator of the Inheritance Tax Division, Indiana Department of Revenue, for his assistance in preparing the portion of this discussion dealing with inheritance tax.

¹Act of Feb. 28, 1947, ch. 10, § 2, 1947 Ind. Acts 49 (codified at IND. CODE §§ 6-8-3-2, -4 (1976)). Prior to the passage of this Act, the income tax laws of Indiana were

In 1951, the department assumed responsibility for the administration of private employment agencies.² In 1963, the Indiana General Assembly enacted the Sales and Use Tax Act³ and Adjusted Gross Income Tax Act,⁴ and transferred the cigarette tax division to the department from the Indiana Alcoholic Beverage Commission.⁵ Finally, in 1973, the department began collection of the alcoholic beverage tax.⁶

The governing body of the department is the revenue board, consisting of the governor, the auditor of state, and the treasurer of state.⁷ The actual day-to-day operations, however, are under the direction of the commissioner and his staff,⁸ who coordinate the various divisions of the department.

2. *Taxpayer Contact Division.*—This section's primary duty is maintenance of communication with the public. The section handles phone calls, directs taxpayers to proper offices, deals with complaints, mails departmental publications, sells departmental rules and regulations, and regulates the licensing of private employment agencies.⁹

3. *Audit Division.*—The audit division was created by the 1961 Indiana General Assembly.¹⁰ It is presently composed of thirteen district offices in Indiana and several smaller offices in large cities throughout the United States. This division not only audits books and records of individuals and businesses, but also assists taxpayers with tax return preparation and provides departmental publications.

4. *Collection Division.*—This division is responsible for collect-

administered by the gross income tax division, created by Act of Feb. 27, 1933, ch. 50, § 1, 1933 Ind. Acts 388 (current version at IND. CODE § 6-2-1-1(b) (Supp. 1979)).

²Act of Mar. 6, 1951, ch. 292, § 2, 1951 Ind. Acts 938 (codified at IND. CODE § 25-16-2-1 (1976)). Prior to the transfer of powers, employment agency licensing was administered by the Industrial Board of Indiana pursuant to Act of Feb. 24, 1927, ch. 25, § 1, 1927 Ind. Acts 74 (current version at IND. CODE § 25-16-1-1 (1976)).

³Ch. 30, § 1, 1963 Ind. Acts 60 (Spec. Sess.) (codified at IND. CODE §§ 6-2-1-37 to -52 (1976 & Supp. 1979)).

⁴Ch. 32, § 101, 1963 Ind. Acts 82 (Spec. Sess.) (codified at IND. CODE §§ 6-3-1-1 to -8-6 (1976 & Supp. 1979)).

⁵Act of Apr. 22, 1963, ch. 37, § 2, 1963 Ind. Acts 207 (Spec. Sess.) (codified at IND. CODE §§ 6-7-1-1, -5, -12, -17 (1976)).

⁶Act of Feb. 13, 1973, Pub. L. No. 55, § 1, 1973 Ind. Acts 290 (codified at IND. CODE §§ 7.1-1-2-1 to -5-11-16 (1976 & Supp. 1979)); Act of Apr. 24, 1973, Pub. L. No. 56, § 19, 1973 Ind. Acts 438 (codified at IND. CODE § 7.1-4-6-3 (1976)).

⁷IND. CODE § 6-8-3-3 (1976).

⁸*Id.* § 6-8-3-6.

⁹*Id.* § 25-16-2-1. Each employment agency is required to register and pay annually a \$50 license fee. A \$1000 bond is required with each original and renewal application. See REV. DEPT., EMPLOYMENT AGENCIES, RULES 1-5 (adopted Jan. 7, 1975) (filed Mar. 3, 1975).

¹⁰Act of Mar. 11, 1961, ch. 341, § 1, 1961 Ind. Acts 1047 (codified at IND. CODE §§ 6-8-4-1 to -4 (1976)).

ing tax liabilities assessed by other divisions. The procedure for collection of unpaid taxes is outlined below:

The first step is the issuance of a notice of tax due,¹¹ Form CS-80, which sets out the deficiency, provides an explanation of the deficiency, and notifies the taxpayer that he must either pay the amount due or file a protest within thirty days. The second step is the issuance of a notice of assessment,¹² Form CS-40, giving the taxpayer an additional ten days to pay the deficiency plus any updated interest. The third step is the issuance of a pre-warrant final notice, Form LCS9, wherein the taxpayer is given an additional ten days for payment to avoid issuance of a tax warrant. Although the first two steps are statutorily defined, this third step has been instituted by the department. It gives the taxpayer one last opportunity to pay the tax plus any accrued interest. The fourth step is the issuance of a warrant for collection of tax, which must be filed with the clerk of the circuit court in the county of the taxpayer's residence.¹³ The warrant then becomes a judgment lien on the taxpayer's real and personal property in that county.¹⁴ If the warrant has not been satisfied within sixty days, the fifth step is the issuance of an "alias tax warrant"¹⁵ to collection attorneys who seek to collect the tax. If the attorney is unsuccessful, a civil suit may be instituted and proceedings supplemental filed.¹⁶

¹¹The statutory authority for issuance of the notice is as follows: (1) Gross income tax, IND. CODE § 6-2-1-17(a) (1976); (2) sales and use tax, *id.* § 6-2-1-51(c); (3) adjusted gross income tax, *id.* § 6-3-6-2(a) (1976 & Supp. 1979); (4) county adjusted gross income tax, *id.* § 6-3.5-1-10; (5) supplemental corporate net income tax, *id.* § 6-3-8-5 (1976); (6) intangibles tax, *id.* § 6-5.1-8-11 (Supp. 1979); (7) occupation income tax, *id.* § 6-3.5-3-11.5; (8) bank tax, *id.* § 6-5-6-26(a) (1976).

¹²See note 11 *supra*.

¹³The statutory authority for issuance of the notice is as follows: (1) Gross income tax, IND. CODE § 6-2-1-18(a) (1976 & Supp. 1979); (2) sales and use tax, *id.* § 6-2-1-51(c) (1976); (3) adjusted gross income tax, *id.* § 6-3-6-3(a)(1) (1976 & Supp. 1979); (4) county adjusted gross income tax, *id.* § 6-3.5-1-10 (Supp. 1979); (5) supplemental corporate net income tax, *id.* § 6-3-8-5 (1976); (6) intangibles tax, *id.* § 6-5.1-9-5.5 (Supp. 1979); (7) occupation income tax, *id.* § 6-3.5-3-11.5; (8) bank tax, *id.* § 6-5-6-24(a) (1976 & Supp. 1979).

¹⁴See note 13 *supra*.

¹⁵See note 13 *supra*.

¹⁶Two other collection remedies are also possible. First, the department can request the attorney general's office to institute a receivership proceeding if the business is still in operation and its outstanding tax liabilities are over 120 days old. Receivership proceedings are authorized by the following statutes: (1) Gross income tax, IND. CODE § 6-2-1-18(d) (1976 & Supp. 1979); (2) sales and use tax, *id.* § 6-2-1-51(c) (1976); (3) adjusted gross income tax, *id.* § 6-3-6-3(d) (1976 & Supp. 1979); (4) county adjusted gross income tax, *id.* § 6-3.5-1-10; (5) supplemental corporate net income tax, *id.* § 6-3-8-5 (1976); (6) occupation income tax, *id.* § 6-3.5-3-11.5 (Supp. 1979); (7) bank tax, *id.* § 6-5-6-24(c) (1976 & Supp. 1979).

Second, the department can institute criminal proceedings against taxpayers who have either collected and not remitted sales taxes, *id.* § 6-2-1-49(a), or deducted and not remitted withholding taxes, *id.* § 6-3-4-8(g).

5. *Advisory Section.*—The advisory section is the legal branch of the department. Its functions include advising the commissioner, reviewing legal documents executed by the department, assisting in the preparation of rules and regulations, and conducting administrative hearings. Because the department is not governed by the Administrative Adjudication Act,¹⁷ the procedure used at all administrative hearings is outlined below:

a. *Review of protest.*—Upon receipt of a notice of tax due, the taxpayer has thirty days to file a protest to the assessment¹⁸ with the division originating the assessment. If an audit is involved, the protest and audit file are reviewed by the audit division's protest review board. With the exception of protests on penalties and responsible officer billings, all files initially go to the division administrators. If the administrator determines that complex legal issues are involved, the file is assigned to the advisory section.

b. *Notice of hearing.*—The office administering the protested audit will notify the taxpayer by mail of the date, time, and place of the administrative hearing.

c. *Representation.*—Any person may represent a taxpayer at an administrative conference. Due to statutory restrictions on releasing confidential information,¹⁹ the taxpayer's representative must have a power-of-attorney on file with the department.

d. *Conduct of hearing.*—Hearings before the department are conducted on an informal basis, without sworn testimony or adherence to the rules of evidence. The taxpayer can present oral testimony at the hearing and is invited to submit a written brief no later than five days before the hearing. If a taxpayer does not appear for the hearing, a decision is made on the basis of any evidence the department has on the matter.

e. *Results of hearing.*—The department's decision is called either a letter of findings or a report of disposition. The letter is

¹⁷*Id.* § 4-22-1-2 (1976) specifically exempts the Indiana Department of Revenue from the provisions of the Administrative Adjudication Act, *id.* §§ 4-22-1-1 to -30 (1976 & Supp. 1979).

¹⁸See note 11 *supra* and accompanying text. Although no statutory authority exists, in practice, if the taxpayer is able to show good cause, the date scheduled for the hearing can be changed. Requests for continuances, however, should be submitted in writing at least one week before the scheduled hearing.

¹⁹Confidentiality provisions for the various tax laws are as follows: (1) Gross income tax, IND. CODE § 6-2-1-29 (1976 & Supp. 1979); (2) sales and use tax, *id.* § 6-2-1-51(c) (1976); (3) adjusted gross income tax, *id.* § 6-3-6-8 (1976 & Supp. 1979); (4) county adjusted gross income, *id.* § 6-3.5-1-10; (5) supplemental corporate net income, *id.* § 6-3-8-5 (1976); (6) occupation income tax, *id.* § 6-3.5-3-11.5 (Supp. 1979); (7) intangibles tax, *id.* § 6-5.1-9-1; (8) bank tax, *id.* § 6-5-6-28 (1976 & Supp. 1979). In addition, the department is in the process of promulgating confidentiality rules and regulations for inheritance tax and alcoholic beverage tax.

issued by a division administrator and the report by the advisory section. Each outlines the findings of fact and conclusions of law on the case decided. In unique situations, a second hearing will be granted before payment is required. Normally, after receiving the decision the taxpayer must first pay the tax and then file a claim for refund if a dispute still exists. A hearing can be held on the refund claim. If the claim is denied, the taxpayer can institute suit in the local courts within ninety days of the department's denial.²⁰

6. *Cigarette Tax Division.*—The cigarette tax is administered by the controller's office. The current tax is \$.105 per pack or \$1.05 per carton.²¹ Distributors must purchase a registration certificate for each location.²²

The provisions of the Cigarette Tax Act do not apply to sales either to the United States government or to interstate shipments.²³ A persistent problem encountered by the department in the area of exemptions is the sale of cigarettes through post exchanges. The attorney general recently issued an opinion,²⁴ however, reaffirming that the federal law²⁵ intended to bar the states from imposing cigarette taxes on cigarettes sold through post exchanges and other official military installations to authorized purchasers. Because the reasons justifying the original creation of these post exchanges no longer exist, the author believes that new federal legislation is needed to correct this favorable treatment afforded to military personnel and their families.

The Cigarette Fair Trade Act²⁶ establishes minimum prices at which cigarettes may be sold by wholesalers and retailers. Although the provisions of this Act are rarely employed, the recent proliferation of certain incentive-type purchase programs instituted by cigarette manufacturers has caused the department to review the scope and application of the Act.

²⁰Procedures for filing refund claims and instituting suit may be found in the following code sections: (1) Gross income tax, *id.* § 6-2-1-19(a) (1976); (2) sales and use tax, *id.* § 6-2-1-51(c); (3) adjusted gross income tax, *id.* § 6-3-6-4(a); (4) county adjusted gross income tax, *id.* § 6-3.5-1-10 (1976 & Supp. 1979); (5) supplemental corporate net income tax, *id.* § 6-3-8-5 (1976); (6) occupation income tax, *id.* § 6-3.5-3-11.5 (Supp. 1979); (7) intangibles tax, *id.* § 6-5.1-7-1; (8) bank tax, *id.* § 6-5-6-27 (1976). The provisions for filing inheritance tax refunds are found at *id.* § 6-4.1-10-1 to -6 (1976).

²¹*Id.* § 6-7-1-12 (Supp. 1979).

²²The annual fee is \$500. *Id.* § 6-7-1-16 (1976). In addition, a \$1,000 bond must accompany each application. *Id.* The amount of the bond, however, needs to be increased because it is currently inadequate to protect the department in the event of violations by the distributors. The Code also provides wholesalers a 4% discount from the price of cigarette stamps or meter units. *Id.* § 6-7-1-17.

²³IND. ADMIN. R. & REGS. §§ (6-7-1-18)-3, to -4 (Burns 1976).

²⁴[1978] IND. ATTY. GEN. ANN. REP. 37.

²⁵4 U.S.C. § 107 (1976).

²⁶IND. CODE § 24-3-2-1 (1976 & Supp. 1979).

The 1979 session of the Indiana General Assembly enacted a new provision concerning the recharging of metered, cigarette-tax stamping machines,²⁷ requiring approval of at least one financial institution in each county to recharge the machines, if at least one such institution applies and meets the bonding requirements. This legislation was prompted by distributors desiring more convenient locations for the recharging of tax stamping machines.

7. *Alcoholic Beverage Tax.*—The alcoholic beverage tax is also administered by the controller's office. The department's function is to insure that the necessary reports are filed and the tax paid by duly licensed breweries, wholesalers, and distributors.²⁸ Licensing and enforcement are duties of the Indiana Alcoholic Beverage Commission.²⁹

The legislature enacted a new refund provision for Indiana brewers this year, entitling them to a refund of one-half of the beer excise tax paid on the first 100,000 barrels produced and distributed in Indiana in a calendar year.³⁰

8. *Motor Fuel Tax Division.*—The motor fuel tax division is charged with the administration and collection of six separate tax laws: motor fuel tax on gasoline,³¹ fuel use tax on fuel other than

²⁷*Id.* § 6-7-1-15.1 (Supp. 1979).

²⁸*Id.* § 7.1-4-6-1 (1976). Taxpayers are required to make payments of the tax by the 20th day of each month and are given a 1½% discount for timely payment and accurate reporting. *Id.* §§ 7.1-4-6-3.5, -4. The Code also provides exemptions for sales delivered out-of-state and for religious use. *Id.* §§ 7.1-4-3-5, -4-6.

²⁹*Id.* §§ 7.1-2-3-1 to -31 (1976 & Supp. 1979).

³⁰*Id.* § 7.1-4-2-8.1 (Supp. 1979). The department is currently promulgating regulations to implement this new refund provision. Authority for promulgation of these rules and regulations is found in *id.* §§ 7.1-4-6-3.6, -2-8.1 (1976 & Supp. 1979). As previously mentioned, the department is also promulgating rules and regulations concerning the confidentiality of alcoholic beverage tax information. *See* note 19 *supra*. The department also promulgated regulations in August 1977, concerning the imposition of a 10% penalty for late remittance and a penalty equal to the unpaid tax if no remittance is made within 10 days of notification of the amount of tax and penalty due. IND. ADMIN. R. & REGS. §§ (7.1-4-6-2)-1 to -3 (Burns' Supp. 1978). IND. CODE § 7.1-4-6-2.1 (Supp. 1979) authorizes the promulgation of the regulations concerning imposition of the penalties.

³¹IND. CODE §§ 6-6-1.1-101 to -1313 (Supp. 1979). *See* note 36 *infra* and accompanying text. The motor fuel tax is imposed at the rate of eight cents per gallon on distributors who first receive the gasoline in the state by import, by blending with other products, or by withdrawal from a refinery or terminal. *Id.* § 6-6-1.1-201. Reports are required to be filed by the 20th day of each month. *Id.* § 6-6-1.1-501. Remittances by the distributors are computed on invoiced gallons. *Id.* A 2% allowance, however, is given the distributor to cover evaporation, shrinkage, losses, and expenses incurred in collection of the tax. *Id.* § 6-6-1.1-705. The tax paid by the distributor is in all cases passed on to the ultimate consumer. *Id.* § 6-6-1.1-201.

Certain gasoline sales are exempt, including sales to another state, territory, foreign country, or to the United States government; sales to post exchanges or

gasoline,³² motor carrier fuel use tax,³³ oil inspection fee,³⁴ petroleum severance tax,³⁵ and marine fuel tax.³⁶

This year the legislature adopted a new codification of the Motor Fuel Tax and Marine Fuel Tax Acts.³⁷ These Acts are the first of a series of codifications of all motor fuel tax laws aimed at improving the organization and clarity of the existing statutes.

A companion bill corrected deficiencies in the original codification. First, the statute of limitations was changed from four to three years in actions involving illegal collection or assessment of the affected taxes,³⁸ thus insuring uniformity of the statute of limitation provisions in the various tax laws. Second, motor fuel tax monies collected are treated as a trust fund for the benefit of the state, and personal liability is imposed for tax, penalty, and interest, upon persons under a duty to collect the tax.³⁹ Third, a person receiving fuel need not be licensed if he pays the tax directly to his supplier.⁴⁰

federal reservations in Indiana; destroyed or stolen gasoline; and sales to a licensed distributor who uses gasoline for any purpose not involving propulsion of motor vehicles on highways. *Id.* § 6-6-1-4.

A major tax break, primarily benefiting farmers, is the credit for tax paid on gasoline used in commercial vehicles that do not use the highway. Purchasers of gasoline for this purpose may claim a credit against either income or corporate tax liability for the tax paid or he may claim a refund by filing with the motor fuel tax division within six months after purchase. *Id.* §§ 6-6-1.1-903, -904(a).

³²IND. CODE §§ 6-6-2-1 to -16 (1976 & Supp. 1979). The fuel use tax is imposed at the rate of eight cents per gallon on diesel fuel, home heating oils, LP gas and other nongasoline fuels used to drive vehicles on public highways. *Id.* § 6-6-2-4. The fuel becomes taxable when it is placed in the tank of the motor vehicles. Reports are filed monthly with a 2% allowance afforded dealers only to cover costs of collecting and remitting the tax. *Id.* § 6-6-2-6 (1976).

³³*Id.* § 6-6-4-1 to -21 (1976 & Supp. 1979). The road tax section of the motor fuel tax division administers the eight cents per gallon tax on motor fuel consumed by motor carriers. *Id.* § 6-6-4-3 (1976). The tax is levied on the amount of fuel consumed by the motor carrier in his Indiana operations with a credit allowed for tax paid on fuel purchases in Indiana. *Id.* § 6-6-4-4. Reports are made on a quarterly basis by all carriers except those who annually certify that they purchase substantially all of their fuel in Indiana. *Id.* § 6-6-4-6.

³⁴*Id.* § 16-6-11-9 (1976 & Supp. 1979). This law is intended to insure the quality of petroleum products. A fee of \$.0008 per gallon is charged to defray the costs of inspecting gasoline and kerosene at the division's laboratory. *Id.*

³⁵*Id.* §§ 6-8-1-1 to -27. The tax is imposed at the rate of 1% of the value of crude petroleum products extracted in Indiana and paid by the owners and producers of such products. *Id.* § 6-8-1-8 (1976). Monthly reports must list the number of barrels of crude oil or thousand cubic feet of gas severed from the ground. IND. ADMIN. R. & REGS. §§ (6-8-1-12)-2 to -3 (Burns 1976).

³⁶IND. CODE §§ 6-6-1.1-101 to -1313 (Supp. 1979). See note 31 *supra* and accompanying text. The marine fuel tax is imposed at the rate of eight cents per gallon on marinas and boat liveries on Indiana's lakes. IND. CODE § 6-6-1.1-201.

³⁷IND. CODE §§ 6-6-1.1-101 to -1313 (Supp. 1979).

³⁸*Id.* § 6-6-1.1-1206.

³⁹*Id.* § 6-6-1.1-801.

⁴⁰*Id.* § 6-6-1.1-401.

Fourth, an additional ground for cancellation of a distributor's license is his failure to distribute 500,000 gallons during a twelve-month period.⁴¹

In addition to the above amendments, certain changes recommended by the department were also adopted. The interest rate on unpaid taxes was increased to eight percent per annum, effective January 1, 1980.⁴² The change, again, reflects the desire for uniform procedures among the various taxing statutes. An amendment was adopted offsetting the strict forfeiture rules which came into operation if an altered invoice was submitted with the claim⁴³ and allowing approval of the claim if it is determined that the change or alteration was not made to improperly obtain a refund.⁴⁴ This provision gives the administrator wide latitude in determining the existence of intentional alteration.

Numerous changes were also made this year to the fuel use tax, motor carrier fuel use tax, and oil inspection fee laws. Definitions have been expanded for the terms "fuel dealer"⁴⁵ and "fuel oil distributor."⁴⁶ Fuel use tax monies collected are to be treated as trust funds of the state, thereby creating the possibility of criminal prosecutions of special fuel use dealers who fail to remit the amounts collected.⁴⁷ Effective January 1, 1980, the interest rate on unpaid fuel use tax was increased to eight percent per annum to conform with other tax laws,⁴⁸ and provisions were made for a three-year statute of limitations and the use of tax warrants.⁴⁹ The new law also allows the department to forgive penalty and interest when tax returns are filed less than ten days after the due date.⁵⁰

9. *Inheritance Tax Division.*—The Indiana inheritance tax is not a tax on the property itself, but on the transferee's right to succeed thereto.⁵¹ The tax is imposed at progressive rates upon lineal and collateral relatives as well as strangers in blood.⁵² Indiana also imposes an estate tax to take full advantage of the credit provided by the federal estate tax law for death taxes paid to the states.⁵³

⁴¹*Id.* § 6-6-1.1-415.

⁴²*Id.* § 6-6-1.1-1301.

⁴³*Id.* § 6-6-1.1-1305.

⁴⁴*Id.*

⁴⁵*Id.* § 6-6-2-2(8). The term now includes one who sells fuel to a user. *Id.*

⁴⁶*Id.* § 6-6-2-2(11). One can be a fuel oil distributor if he sells and delivers heating fuel, LP gas, or propane. *Id.*

⁴⁷*Id.* § 6-6-2-4.

⁴⁸*Id.* §§ 6-6-2-9, -4-20.

⁴⁹*Id.* § 6-6-2-10(b)-(c).

⁵⁰*Id.* § 6-6-2-10(a).

⁵¹*Armstrong v. State*, 72 Ind. App. 303, 120 N.E. 717 (1918).

⁵² IND. CODE § 6-4.1-5-1 (1976 & Supp. 1979).

⁵³*Id.* § 6-4.1-11-1 (1976).

The inheritance tax applies to a property interest transfer by a resident of this state of real and tangible personal property located within the state, and of intangible personal property regardless of where it is located.⁵⁴ The tax also applies to a property interest transfer by a nonresident decedent of all real and tangible personal property within the jurisdiction of this state.⁵⁵ The transfer of intangible personal property interests of a nonresident decedent is exempt if reciprocity exists between Indiana and the state of which the decedent died a resident.⁵⁶ Certain deductions are also allowed in determining the value to each transferee of the taxable transfer.⁵⁷

The Indiana inheritance tax is not self-assessing. For resident decedents, the tax is determined by the court with probate jurisdiction of the county in which the decedent was domiciled at the time of his death.⁵⁸ For nonresident decedents, the tax is determined by the Indiana Department of Revenue.⁵⁹

If a federal estate tax return is required, a copy of the final determination of the federal estate tax must be filed with the Indiana Department of Revenue within thirty days after it is received.⁶⁰

The inheritance tax for estates of resident decedents is paid to the county treasurer of the county in which the decedent died a resident.⁶¹ The inheritance tax for nonresident decedents' estates and the estate tax for both resident and nonresident estates, is paid directly to the Indiana Department of Revenue.⁶²

If the inheritance tax is paid within one year of the decedent's death, a discount of five percent of the tax determined is allowed.⁶³

⁵⁴*Id.* § 6-4.1-2-2.

⁵⁵*Id.* § 6-4.1-2-3 (Supp. 1979).

⁵⁶*Id.* § 6-4.1-3-5 (1976). There is no tax on the intangible personal property of nonresident decedents dying after June 30, 1979. *Id.* § 6-4.1-2-3.

Other types of transfers are also exempt: a transfer for public, charitable, and religious uses; a transfer of life insurance proceeds payable to a named beneficiary other than the estate of the decedent; a transfer of death benefits that qualify under I.R.C. § 2039; a transfer of entireties-held real estate; and transfers up to the total amount of the personal exemption allowed each transferee. *Id.* §§ 6-4.1-3-1 to -15 (1976 & Supp. 1979).

⁵⁷*Id.* §§ 6-4.1-3-1 to -15 (1976 & Supp. 1979).

⁵⁸*Id.* § 6-4.1-12-1. For resident decedents, the inheritance tax return, Form IH-6, is required to be filed with the court within 12 months after the decedent's death. *Id.* § 6-4.1-4-1.

⁵⁹*Id.* § 6-4.1-5-14 (1976). For nonresident decedents, the return (Form 12) must be filed with the Indiana Department of Revenue within six months after the date of death. *Id.* § 6-4.1-4-7 (1976 & Supp. 1979).

⁶⁰*Id.* § 6-4.1-4-8 (1976).

⁶¹*Id.* § 6-4.1-9-5 (1976 & Supp. 1979).

⁶²*Id.* §§ 6-4.1-9-4, -11-6 (1976).

⁶³*Id.* § 6-4.1-9-2.

If the tax is paid after one year, but before eighteen months from the date of death, the full amount of tax determined is payable, without interest; after eighteen months, interest is charged at the rate of ten percent per annum from the date of death, unless the court reduces the interest to six percent per annum upon a showing by the estate of unavoidable delay.⁶⁴ If additional inheritance tax is determined to be due because of a final federal estate tax determination, however, interest is imposed at the rate of six percent per annum from thirty days after such final federal determination is received.⁶⁵

A claim for refund may only be made to the Indiana Department of Revenue, which is authorized to order the refund and repayment, without interest, of all taxes erroneously or illegally collected, even though such taxes have been paid voluntarily and without protest.⁶⁶ Claims for refunds must be filed within three years from the date of payment or within one year from the date the tax is finally determined by the highest court hearing the matter, whichever is later.⁶⁷ Should such a refund claim be denied, the applicant may appeal the denial by filing a complaint in the appropriate court within ninety days of the date of such denial, naming the department as the defendant.⁶⁸

Before the personal property (except for life insurance proceeds) of a resident decedent is transferred, the person who has control over the property must obtain the written consent (Form IH-14) of the assessor of the county in which the decedent died a resident.⁶⁹ Consent will be given only to the extent that the transfer will not jeopardize the collection of the inheritance tax.⁷⁰ In addition, any person who has possession of, or control over, a resident decedent's safe deposit box must give reasonable notice of the time and place of such opening to the county assessor of the county in which the

⁶⁴*Id.* § 6-4.1-9-1.

⁶⁵*Id.* § 6-4.1-9-1.5.

⁶⁶*Id.* § 6-4.1-10-1, -3.

⁶⁷*Id.* § 6-4.1-10-1.

⁶⁸*Id.* § 6-4.1-10-4. A person may obtain a redetermination of the inheritance tax under any one or more of the following statutes of limitations: For any matter, within 90 days of the date of the original determination (for both resident and nonresident decedents); for a reappraisal of the decedent's property, within one year of the date of the original order, or two years if the original appraisal was fraudulently or erroneously made (for resident decedents); for a change in the fair market value of the assets of the decedent's estate due to the final determination of federal estate tax, within 30 days after a copy of such final determination is filed with the Indiana Department of Revenue (for both resident and nonresident decedents). *Id.* §§ 6-4.1-7-1 to -6 (1976 & Supp. 1979).

⁶⁹*Id.* § 6-4.1-8-4 (Supp. 1979).

⁷⁰*Id.*

decedent died a resident, and the assessor must be given the opportunity to inventory the complete contents of the box.⁷¹

a. *Statutory developments.*—Major changes were made this year in the inheritance tax code. All transfers to a surviving spouse are now exempt from the Indiana inheritance tax,⁷² but not the Indiana estate (pick-up) tax. The Indiana estate tax is not a tax on property or on the right to transfer property, but merely a device by virtue of provisions found in the Internal Revenue Code⁷³ and the Indiana Code⁷⁴ whereby death taxes bound for the United States Treasury are detoured to the Indiana Treasury. For an estate in which property is located entirely within Indiana, the death taxes will not exceed the total determined under the Internal Revenue Code, but if the decedent dies with property in more than one state, the total state death taxes could exceed the maximum credit allowable under the Internal Revenue Code.⁷⁵

Consent-to-transfer provisions of the law were not amended concerning a transfer to a spouse. However, because a spouse could not be liable for the payment of inheritance tax in any event, it will be the policy of the department that only the *proportionate share* passing to a surviving spouse may be transferred at the same time an application for consent to transfer is made on accounts that are held jointly with rights of survivorship. In other words, if the account is held jointly between a husband and wife and a third party, only one-half of the account could be transferred at the time the application for consent to transfer is made. Also, because property in the decedent's safe deposit box could pass to someone other than the surviving spouse, the notice requirement and the opportunity to inventory a decedent's safe deposit box have not been changed.⁷⁶

A minor child's personal exemption was increased from \$5,000 to \$10,000, and the definition of a minor child was changed from one under the age of eighteen to one under the age of twenty-one at the time of the decedent's death.⁷⁷ The personal exemption for all other Class A beneficiaries remains at \$2,000.⁷⁸

An orphan's exemption, similar to that provided by section 2057 of the Internal Revenue Code, is provided to a child of the decedent who is less than twenty-years old on the date of death and who has

⁷¹*Id.* § 6-4.1-8-5 (1976 & Supp. 1979).

⁷²*Id.* § 6-4.1-3-7 (Supp. 1979).

⁷³I.R.C. § 2011.

⁷⁴IND. CODE § 6-4.1-11-1 (1976).

⁷⁵*State v. Purdue Nat'l Bank*, 355 N.E.2d 414 (Ind. Ct. App. 1976) (construing IND. CODE § 6-4.1-37 (1971) (repealed 1976) (current version at *id.* § 6-4.1-11-2 (1976 & Supp. 1979))).

⁷⁶See note 71 *supra* and accompanying text.

⁷⁷IND. CODE § 6-4.1-3-9 (Supp. 1979).

⁷⁸*Id.* § 6-4.1-3-10 (1976 & Supp. 1979).

no known parent, provided that the decedent does not leave a surviving spouse.⁷⁹ The major differences between the Indiana provision and section 2057 of the Internal Revenue Code are: (1) the limitation in the case of a life estate or other terminable interest for federal estate tax purposes, and (2) the maximum age (twenty for federal estate tax purposes⁸⁰ and nineteen for Indiana inheritance tax purposes⁸¹). The age difference ensures that a twenty-year-old child will receive a \$10,000 personal exemption, because he may not receive both the orphan's exemption and the minor child's exemption.⁸²

The State of Indiana or an interested person will be allowed to petition the court for a redetermination of tax due to a change in deductions or in the fair market value of the assets of a decedent's estate as a result of the final determination of federal estate tax.⁸³

A person who believes that more inheritance tax is due than that originally determined by the court may pay the additional tax, and any interest due thereon, to the county treasurer without obtaining an amended order.⁸⁴ This provision should speed the final disposition of the payment and clearance of any additional taxes agreed to be due by the estate and the Indiana Department of Revenue.

A new section states that any change in the Indiana Department of Revenue's interpretation of any statute that could increase a person's inheritance tax liability must be properly promulgated in a rule before it will take effect.⁸⁵ What effect this new provision will have on the inheritance tax determination in any given estate is not known. Its application is open to more than one interpretation, however, and it may be unconstitutional as presently written. Because no interpretation of the department has the force of law until it is promulgated in a rule or regulation,⁸⁶ the need for this provision is difficult to understand. Both parties have their judicial remedies if they cannot agree on the interpretation. This provision, if upheld, could have the effect of denying a hearing on the merits of the issue because of a procedural violation.

⁷⁹*Id.* § 6-4.1-3-8.5 (Supp. 1979). The amount of the exemption is determined by multiplying \$5,000 by the quantity of 21 minus the child's age at the time of the parent's death: \$5,000 x (21 - child's age).

⁸⁰I.R.C. § 2057(e)(1).

⁸¹IND. CODE § 6-4.1-3-8.5 (Supp. 1979).

⁸²*Id.* § 6-4.1-3-9.

⁸³*Id.* § 6-4.1-7-6(b) (1976 & Supp. 1979). The petition must still be filed within 30 days after a copy of the final determination of federal estate tax is filed with the Indiana Department of Revenue. *Id.*

⁸⁴*Id.* § 6-4.1-9-5(a) (Supp. 1979).

⁸⁵*Id.* § 6-4.1-12-6.5.

⁸⁶*Id.* § 6-8-3-8 (1976).

The personal representative of a decedent's estate will no longer be required to attach the countersigned inheritance tax receipt to his final report.⁸⁷ This provision does not relieve the personal representative of his personal liability for payment of the tax,⁸⁸ and he should not petition the court for a decree of final distribution of the estate if the estate is not in a condition to be closed.⁸⁹ If the federal and state death taxes have not been finally determined, the estate is not in a condition to be closed.⁹⁰ Also, a decree of discharge of the personal representative may be limited under the appropriate circumstances.⁹¹

The issue of whether a personal representative who is discharged by the court from further duties as a personal representative is also relieved of any further liability for payment of the Indiana inheritance taxes was settled long ago by the Indiana Supreme Court in *Nation v. Green*.⁹² A personal representative acts as an agent for the state in making the collection and is personally responsible for collection of the tax.⁹³

Intangible personal property of a nonresident decedent will be exempt from the Indiana inheritance tax and the Indiana estate (pick-up) tax.⁹⁴ This provision will apply to nonresidents of this state and this country, whether or not they were previously a resident of Indiana.

Under prior law, Indiana exempted from tax the intangible personal property of decedents who were residents of a state with which Indiana had a reciprocal agreement under the Indiana Reciprocal Agreement Statute.⁹⁵ In *State v. Davies*,⁹⁶ the court of appeals held that the reciprocal agreement statute applied to both the inheritance tax and the Indiana estate tax prior to the enactment of Indiana Code section 6-4.1-3-5,⁹⁷ which specifically allows an exemption only from inheritance tax.⁹⁸ In 1979, the legislature exempted the intangible personal property of a nonresident from Indiana estate tax,⁹⁹ thus eliminating double taxation on the estates of

⁸⁷*Id.* § 6-4.1-9-13 (1976) (repealed 1979).

⁸⁸*Id.* § 6-4.1-8-1 (1976).

⁸⁹*Id.* § 29-1-17-2(a).

⁹⁰*Id.* § 29-1-17-2(b).

⁹¹*Id.* §§ 29-1-17-13, -14, -16.

⁹²188 Ind. 697, 123 N.E. 163 (1919).

⁹³*Id.* at 703, 123 N.E.2d at 165.

⁹⁴IND. CODE §§ 6-4.1-2-3, -11-2(c) (Supp. 1979).

⁹⁵*Id.* § 6-4-1-26 (1971) (repealed 1976) (current version at *id.* § 6-4.1-3-5 (1976)).

⁹⁶379 N.E.2d 501 (Ind. Ct. App. 1978). For discussion of another aspect of this case, see notes 103-07 *supra* and accompanying text.

⁹⁷IND. CODE § 6-4.1-3-5 (1976).

⁹⁸379 N.E.2d at 506-07.

⁹⁹IND. CODE § 6-4.1-2-3 (Supp. 1979).

residents of states with which Indiana does not enjoy reciprocity. If the decision in *State v. Davies* stands, the following situation will exist: For decedent's dying prior to February 18, 1976, the exemption applies to both the inheritance and estate taxes; from February 18, 1976, through June 30, 1979, the exemption applies only to the inheritance taxes; after July 1, 1979, the exemption again applies to both taxes.

The deductions allowed against the value of property interests transferred by a resident decedent under his will or under the laws of intestate succession¹⁰⁰ are now also allowed against the value of property interests transferred under a trust.¹⁰¹ In estates consisting entirely of trust property, the issue arose as to whether a transfer by trust occurred by operation of law and, if not, what deductions were valid against the value of such property interests. This issue is now settled. The new provision was made retroactive to March 1, 1976,¹⁰² to cover those estates in which the issue first arose.

b. *Judicial developments.*—During the last year, three cases involving Indiana's inheritance and estate tax were decided. The decisions raised the questions of reciprocity, real estate held by the entireties, and contribution.

*State v. Davies*¹⁰³ involved a decedent who had died in Florida owning intangible personal property in Indiana. The court considered the jurisdiction of the probate court to allow a refund of Indiana estate tax paid by the nonresident decedent's estate. Resolution of this issue required an analysis of both the rehearing statute¹⁰⁴ and the refund statute.¹⁰⁵ The former allows taxpayers the opportunity to contest the tax determination of the appraisal and assessment; the latter requires the payment of tax before a suit for refund can be instituted.¹⁰⁶ The court held that these two statutes created alternative remedies; thus, the estate's failure to protest the assessment did not bar a subsequent refund suit after the tax had been paid.¹⁰⁷

In *State v. Union Bank & Trust Co.*,¹⁰⁸ the decedent and her husband had transferred certain land owned by them as tenants by the entireties, reserving a life estate. The husband died in 1968 and no

¹⁰⁰*Id.* § 6-4.1-3-13 (1976 & Supp. 1979).

¹⁰¹*Id.* § 6-4.1-3-13(b) (Supp. 1979).

¹⁰²Act of Apr. 9, 1979, Pub. L. No. 75, § 16, 1979 Ind. Acts 319 (not codified).

¹⁰³379 N.E.2d 501 (Ind. Ct. App. 1978). For discussion of another aspect of this case, see notes 96-99 *supra* and accompanying text.

¹⁰⁴IND. CODE § 6-4-1-21 (repealed 1976) (current version at *id.* § 6-4.1-7-5 (1976)).

¹⁰⁵*Id.* § 6-4-1-17 (repealed 1976) (current version at *id.* §§ 6-4.1-10-1 to -3 (1976)).

¹⁰⁶379 N.E.2d at 503-04.

¹⁰⁷*Id.* at 505.

¹⁰⁸380 N.E.2d 1279 (Ind. Ct. App. 1978).

estate was opened. When the decedent died in 1973, the administrator reported only one-half of the value of the property, contending that the remainder passed to the grantee at her husband's death.¹⁰⁹ The State, on appeal from the denial of its petition for reappraisal, contended that the estate was liable for tax on the entire value of the property. In agreeing with this contention, the court quoted Inheritance Tax Regulation Two: "Whenever real estate which is held by the entireties is transferred, subject to joint and successive life estates in the grantors, without valuable and sufficient consideration in money or money's worth, such transfer will be taxed in the estate of the last grantor to die."¹¹⁰ When the husband died, he had no interest to pass to beneficiaries. Therefore, no taxable transfer occurred on the husband's death because he had no power of conveyance without his wife's consent.¹¹¹

*State v. George*¹¹² concerned jointly held property and the question of contribution. George, the sole heir and sister of the decedent, filed a contribution affidavit to support her claim that one-half the value of the real estate held in joint tenancy with the decedent was hers and therefore entitled to exclusion. The state contended that there was no contribution and that none could be shown since the property was originally owned solely by the decedent. The court of appeals agreed that the type of contribution envisioned by the exemption statute¹¹³ did not include household and farm hand services.¹¹⁴ Because contribution must be in money or money's worth, services performed by family members did not qualify.¹¹⁵ The court, however, remanded the case to afford George the opportunity to show proof of ownership of jointly held personal property.¹¹⁶

10. *Sales Tax Division*.—The sales tax division is charged with the administration of the sales¹¹⁷ and use tax.¹¹⁸

¹⁰⁹*Id.* at 1280.

¹¹⁰*Id.* at 1281 (quoting IND. REV. BD., IND. INHERITANCE TAX STATUTES, REGS., CIRCULARS & PROC. § 8, No. 2 (1976)).

¹¹¹380 N.E.2d at 1280.

¹¹²388 N.E.2d 600 (Ind. Ct. App. 1979).

¹¹³IND. CODE § 6-4-1-1 (1971) (repealed 1976) (current version at *id.* § 6-4-1-2-5 (1976)).

¹¹⁴388 N.E.2d at 602.

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷IND. CODE § 6-2-1-37 (1976). A sales tax return must be filed within 30 days after the close of the month. Quarterly and annual filings can be authorized if average monthly tax liabilities of the merchant fall below certain stated amounts. A return must be filed even if no sales are made during the reporting period, to prevent the business from receiving delinquency notices. When the merchant ceases his business, he is required to notify the department in writing and file all tax returns within 30 days of closing. For the requirements for filing a sales tax return, see *id.* § 6-2-1-51(a) (1976).

¹¹⁸*Id.* § 6-2-1-41.

a. *In general.*—The gross retail tax is imposed at the rate of four percent on transactions by retail merchants which constitute selling at retail.¹¹⁹ The seller is required to collect the tax on his gross receipts, less allowable exemptions, and remit the tax to the department.¹²⁰ In addition, governmental entities are required to collect and remit tax on receipts derived from the performance of proprietary activities.¹²¹ Special provisions are made for contractors, with tax treatment dependent on whether jobs are performed on a lump-sum or time-and-materials basis.¹²²

The use tax is imposed at the rate of four percent on the storage, use, or consumption in Indiana of tangible personal property on which the sales tax has not been paid.¹²³ The tax also applies to tangible personal property originally purchased for an exempt purpose and subsequently put to a taxable use.¹²⁴ The tax is normally paid directly to the Indiana Department of Revenue.¹²⁵

Numerous transactions are exempt from sales and use tax.¹²⁶ Of all the exemptions, the most difficult to administer are those per-

¹¹⁹*Id.* § 6-2-1-37.

¹²⁰The major transactions to which the tax applies are: renting or leasing hotel and motel accommodations, auditoriums, banquet halls, tents, and camper parks and other rooms or accommodations for periods less than 30 consecutive days, *id.* § 6-2-1-38(b) (1976 & Supp. 1979); the sale of electricity, water or gas, *id.* § 6-2-1-38(c); charges for intrastate telephone and telegraph services, *id.* § 6-2-1-38(d), (e); sales of tangible personal property to the consumer, *id.* § 6-2-1-38(a); the rental or leasing of tangible personal property, *id.* § 6-2-1-38(1); local and intrastate cable television service, *id.* § 6-2-1-38(n); auction sales, *id.* § 6-2-1-38(o); and isolated or occasional sales of motor vehicles and aircraft, *id.* § 6-2-1-38(m), (q).

¹²¹*Id.* § 6-2-1-38(g).

¹²²IND. ADMIN. R. & REGS. § (6-2-1-38)-19 (Burns 1976). If contractors perform jobs on a lump-sum basis, they are required to pay sales or use tax on the cost of materials they purchase. If jobs are performed on a time-and-materials basis, the contractor must collect sales tax on the contract price of materials unless he receives an exemption certificate or direct pay permit. *Id.*

¹²³IND. CODE § 6-2-1-41 (1976).

¹²⁴*Id.* § 6-2-1-48.

¹²⁵*Id.* § 6-2-1-51(a). Registered retail merchants remit any use tax due on the sales tax return, Form ST-103A. A person who is not registered with the department has the option of reporting the tax on his personal income tax return or filing a use tax return, Form ST-115.

An out-of-state merchant may be authorized by the department to collect the use tax on tangible personal property delivered into Indiana. *Id.* § 6-2-1-47(b) (1976 & Supp. 1979). If this method is employed, the Indiana customer pays the tax to the merchant rather than remitting it directly to the department. To prevent problems of proof in the event of a subsequent audit, the purchaser should require the out-of-state merchant to furnish him with a receipt showing that the use tax has been paid.

¹²⁶Sales of tangible personal property to be directly used in direct production, *id.* § 6-2-1-39(b)(1), (6), (10) (1976 & Supp. 1979) (applying to purchases of machinery, tools, and equipment to be used in manufacture, fabrication, assembly, extraction, mining, processing, refining, and agriculture); sales of tangible personal property for direct use

taining to sales for direct use in direct production.¹²⁷ The various exemptions containing this language have been the source of continuing litigation¹²⁸ and have prompted unsuccessful legislative attempts to delete the double directness requirement.

The Indiana Court of Appeals recently resolved the issue of whether equipment used to transmit television signals is exempt from sales tax.¹²⁹ The taxpayer was an Indiana corporation engaged in the cable television business, which entails processing electronic signals to produce viewable signals in home television sets. The taxpayer contended that television signals were tangible personal property. Under this theory, the materials and equipment used for transmitting and gathering the signals would be exempt from sales tax within the meaning of Indiana Code section 6-2-1-39(b)(6),¹³⁰ which exempts materials, tools, and equipment directly used in the direct production of tangible personal property. The State contended that cable television was a service, thereby precluding application of the exemption statute.

The court of appeals found that the statute specifically labeled cable television as a service.¹³¹ Because a service is not tangible personal property, the exemption statute was not applicable. In reaching this conclusion, the court restated the familiar principle

in public transportation, *id.* § 6-2-1-39(b)(4); sales of newspapers, *id.* § 6-2-1-39(b)(3); sales to the state and its political subdivisions for use in governmental activities, *id.* § 6-2-1-39(b)(5); certain sales to not-for-profit organizations, *id.* § 6-2-1-39(b)(8); purchases of tangible personal property for resale, *id.* § 6-2-1-39(b)(9); sales of motor vehicles, trailers, and aircraft in Indiana for immediate transportation and licensing in another state, *id.* § 6-2-1-39(b)(12), (29); certain prescription drugs, *id.* § 6-2-1-39(b)(13); sales to electric, water and gas utilities for direct use in direct production, *id.* § 6-2-1-39(b)(16) to (19); sales of food for human home consumption, *id.* § 6-2-1-39(b)(20); certain sales of medical devices and equipment, *id.* § 6-2-1-39(b)(21), (22), (23), (28); sales of eyeglasses and contact lenses, *id.* § 6-2-1-39(b)(24); sales to municipally-owned public utilities, *id.* § 6-2-1-39(b)(27).

Certain gross income tax exemptions are applicable to the sales and use tax. *Id.* § 6-2-1-7(a) (income derived from interstate commerce); *id.* § 6-2-1-7(b) (taxes collected by the taxpayer as an agent for Indiana or the United States); *id.* § 6-2-1-7(c) (sales to the United States government which the department is prohibited from taxing by the United States Constitution); *id.* § 6-2-1-7(m) (retailers' excise taxes); *id.* § 6-2-1-7(o) (encumbrances on tangible personal property received in a reciprocal exchange for like-kind property).

¹²⁷*E.g.*, *id.* § 6-2-1-39(b)(1), (6), (10).

¹²⁸*See* Indiana Dep't of State Revenue v. Mumma Bros. Drilling Co., 364 N.E.2d 167 (Ind. Ct. App. 1978); Indiana Dep't of State Revenue v. Indianapolis Transit Sys., Inc., 356 N.E.2d 1204 (Ind. Ct. App. 1976); Indiana Dep't of State Revenue v. American Dairy, Inc., 338 N.E.2d 698 (Ind. Ct. App. 1975); Indiana Dep't of State Revenue v. RCA Corp., 160 Ind. App. 55, 310 N.E.2d 96 (1974).

¹²⁹Indiana Dep't of State Revenue v. Cable Brazil, Inc., 380 N.E.2d 555 (Ind. Ct. App. 1978).

¹³⁰IND. CODE § 6-2-1-39(b)(6) (Supp. 1979). *See* note 126 *supra*.

¹³¹380 N.E.2d at 559.

that exemption statutes are strictly construed against the party claiming the exemption.¹³²

To be relieved from collection of the sales tax, the retail merchant must obtain an exemption certificate from the purchaser containing the name and address of the purchaser, his registered retail merchant certificate number, and the nature of the property purchased.¹³³ Blanket certificates can be used if the same type of property is sold to a particular purchaser on a regular basis.¹³⁴

The use of an exemption certificate by a purchaser should not be confused with a direct pay permit.¹³⁵ The exemption certificate indicates that the purchase is for an exempt use and therefore not subject to tax. The direct pay permit, by contrast, merely indicates that the merchant need not collect the tax because the holder of the permit will remit the tax directly to the department. The fine distinction between these two documents is often confused.

A registered retail merchant certificate is required of all individuals, firms, partnerships, corporations and associations selling at retail, renting or leasing tangible personal property in Indiana.¹³⁶ A retail merchant selling at retail is one who sells tangible personal property for use or consumption by an ultimate consumer in the ordinary course of a regularly conducted business activity.¹³⁷ Merchants selling only exempt food are not required to register unless they also sell food as a street vendor or through a vending machine.¹³⁸

b. Statutory developments.—This year's sales and use tax amendments reflected the Indiana General Assembly's inclination to

¹³²*Id.* See *Indiana Dep't of State Revenue v. Indianapolis Transit Sys., Inc.*, 356 N.E.2d 1024 (Ind. Ct. App. 1976); *Indiana Dep't of State Revenue v. American Dairy*, 338 N.E.2d 698 (Ind. Ct. App. 1975); *Madding v. Indiana Dep't of State Revenue*, 149 Ind. App. 74, 270 N.E.2d 771 (1971); *Gross Income Tax Div. v. National Bank & Trust Co.*, 226 Ind. 293, 79 N.E.2d 651 (1948).

¹³³IND. CODE §§ 6-2-1-40(c), -47(a) (1976 & Supp. 1979).

¹³⁴*Id.* These requirements do not apply to sales of exempt food, prescription drugs, blood or plasma, oxygen or insulin for medical use, newspapers, or to artificial limbs or orthopedic devices prescribed by a doctor. The relief from use of an exemption certificate for these transactions is not mandated by the Code but developed through department practice. Adequate records, however, should be maintained by the seller of the amount of these sales. Exemption certificates are also not required for sales made to other states, but bills of lading showing the delivery point should be kept by the seller.

¹³⁵The use of direct pay permits is authorized by *id.* § 6-2-1-52 (1976).

¹³⁶The certificate is obtained by filing an application with the Indiana Department of Revenue accompanied by a \$3.50 fee and must be renewed each year. The certificate number is to be used by the merchant in making exempt purchases and in his communications with the department. The requirements for registration are contained in *id.* § 6-2-1-40 (1976 & Supp. 1979).

¹³⁷*Id.* § 6-2-1-1(j).

¹³⁸See *id.* § 6-2-1-39(20)(xi)-(xii).

broaden the exemptions afforded under the Act. The legislature provided for a sales tax exemption on sales of gasohol,¹³⁹ which is described as a fuel with at least ten percent agriculturally derived ethyl alcohol and not more than ninety percent gasoline.¹⁴⁰ It is assumed that the purpose of this exemption is to promote the sale of this product, which is allegedly more efficient and cleaner burning than gasoline.

Retail merchants may no longer advertise gasoline at a price different from that required to be displayed on the pump.¹⁴¹ In the past, the advertised price often included the phrase, "plus sales tax," in such small lettering that a potential customer could be misled as to the actual price.

The sales tax does not apply to the rental of rooms, lodgings, or accommodations for more than thirty days.¹⁴² This exemption has been extended to all counties imposing capital improvement or innkeeper's taxes,¹⁴³ with the notable exception of Lake County.¹⁴⁴ If the original period of rental is more than thirty days, any additional periods extending the original period will be treated as a part of the period of more than thirty days.

Legislation this year afforded a partial exemption to sellers of mobile and modular homes, exempting from sales tax thirty-five percent of the gross income received from these sales.¹⁴⁵ The exemption applies to the expenditures of labor in the manufacture of these homes.¹⁴⁶ This statute creates many inequities in the law. First, the statute ignores the express wording of another statute¹⁴⁷ that items such as fabrication, manufacture and assembly are part of selling at retail for purposes of imposition of the tax. Second, the statute establishes a dangerous precedent, because all manufacturers may now request an exemption equal to the labor costs of items they produce. Finally, this sales tax benefit also gives sellers of these homes an indirect gross income tax break.¹⁴⁸ The statute, in essence, allows a labor and materials breakdown for purposes of computing the sales tax without a corresponding provision for the computation of the gross income tax. In summary, manufacturers in this industry will be receiving the best of both worlds.

¹³⁹*Id.* § 6-2-1-39(b)(29) (Supp. 1979).

¹⁴⁰*Id.*

¹⁴¹*Id.* § 6-2-1-37.5(b).

¹⁴²*Id.* § 6-2-1-38(b).

¹⁴³*Id.* §§ 6-9-1-5, -2.5-6, -3-4, -4-6, -5-6, -6-6, -7-6; *id.* §§ 18-4-17-11, -7-18-11.

¹⁴⁴*See id.* §§ 6-9-1-1 to -3-5; *id.* §§ 18-4-17-11, -7-18-11 (1976 & Supp. 1979) (Lake County does not fall within these parameters).

¹⁴⁵*Id.* § 6-2-1-39.2 (Supp. 1979).

¹⁴⁶*Id.*

¹⁴⁷*See id.* § 6-2-1-1(k).

¹⁴⁸*See id.* § 6-2-1-5 (1976).

The monetary problems of the elderly were considered in the passage of an energy assistance program.¹⁴⁹ Electric utilities and heating fuel providers are allowed a sales and use tax deduction for energy assistance extended to the elderly.¹⁵⁰

The use tax will no longer be imposed upon tangible personal property delivered into the state for the sole purpose of being processed, printed, fabricated or manufactured, and subsequently shipped out of state.¹⁵¹ This legislation will primarily affect businesses engaged in printing publications for out-of-state clients.

New statutory provisions concerning administrative matters were also enacted. First, the department was prohibited from issuing a sales or use tax permit to any taxpayer having outstanding tax warrants for gross income tax, sales tax, use tax, adjusted gross income tax, or county adjusted gross income tax.¹⁵² The registered retail merchant certificate, however, can be issued once the tax is paid or a satisfactory payment plan is established.¹⁵³ Second, the department was required to furnish the Indiana Bureau of Motor Vehicles with a list of outstanding tax warrants for the above mentioned taxes.¹⁵⁴ The bureau will then record the warrant as a lien on the taxpayer's title and list the State of Indiana as a lienholder. If the state is the only lienholder on the title, the commissioner of the Indiana Department of Revenue will be the custodian of the title and will be required to notify the owner of the department's receipt of the title.¹⁵⁵ Although this portion of the statute will serve a useful purpose, its administration will be difficult because of the determination of costs and because of the potential confidential nature of the information provided to the bureau.

11. Income Tax Division.—The income tax division is charged with the responsibility of collecting and administering the gross income tax,¹⁵⁶ adjusted gross income tax,¹⁵⁷ supplemental net income tax,¹⁵⁸ county adjusted gross income tax,¹⁵⁹ intangibles tax,¹⁶⁰ and occupation income tax.¹⁶¹

¹⁴⁹*Id.* §§ 4-3-10-1 to -18 (Supp. 1979).

¹⁵⁰*Id.* § 6-2-1-49(d).

¹⁵¹*Id.* § 6-2-1-42(e).

¹⁵²*Id.* § 6-8-3-17.

¹⁵³*Id.* § 6-8-3-17(c).

¹⁵⁴*Id.* § 6-8-3-17(a).

¹⁵⁵*Id.* § 6-8-3-17(e).

¹⁵⁶*Id.* §§ 6-2-1-1 to -2-3 (1976 & Supp. 1979).

¹⁵⁷*Id.* §§ 6-3-1-1 to -8-6.

¹⁵⁸*Id.* §§ 6-3-8-1 to -6 (1976).

¹⁵⁹*Id.* §§ 6-3.5-1-1 to -12 (1976 & Supp. 1979).

¹⁶⁰*Id.* §§ 6-5.1-1-1 to -9-6 (Supp. 1979).

¹⁶¹*Id.* §§ 6-3.5-3-1 to -13 (1976 & Supp. 1979). These administrative functions are performed by the individual income tax section, corporation income tax section, in-

a. *Gross income tax.*—The Gross Income Tax Act of 1933¹⁶² applied to both corporate and individual taxpayers. With the passage of the Adjusted Gross Income Tax Act in 1963,¹⁶³ individuals, partnerships, trusts, and estates were exempted from the tax. The gross income tax is now imposed only on non-Subchapter S corporate taxpayers¹⁶⁴ at two different rates.¹⁶⁵ The respective rates are decreasing at a slow percentage, with complete elimination of the tax scheduled for December 31, 2007.¹⁶⁶

The tax is imposed on a taxpayer's gross income with virtually no deductions. Certain receipts, however, are deemed nontaxable under restricted situations.¹⁶⁷ Each corporate taxpayer is also entitled to a deduction of \$1,000 per year from its taxable gross

tangibles tax section, fiduciary income tax section, not-for-profit section, and withholding tax section.

¹⁶²Ch. 50, § 1, 1933 Ind. Acts 338 (current version at IND. CODE §§ 6-2-1-1 to -36 (1976 & Supp. 1979)).

¹⁶³Ch. 32, § 101, 1963 Ind. Acts 82 (Spec. Sess.) (codified at IND. CODE §§ 6-3-1-1 to -8-6 (1976 & Supp. 1979)).

¹⁶⁴Returns, under the Code, must be filed by the 15th day of the 4th month following the close of the taxpayer's calendar or fiscal year. IND. CODE § 6-2-1-15(a) (Supp. 1979); IND. REV. BD., IND. GROSS INCOME TAX REG. 6-2-1-15(020) (effective Dec. 14, 1978) [hereinafter cited as GROSS INCOME REG.]. Not-for-profit organizations have one additional month to file their returns. IND. CODE § 6-2-1-7(i)(4) (Supp. 1979); GROSS INCOME REG., *supra*, at 6-2-1-7(1)(070). Affiliated corporations may file a consolidated return if they meet the statutory requirements. IND. CODE § 6-2-1-14(a) (1976); GROSS INCOME REG., *supra*, at 6-2-1-14(010). All taxpayers subject to the gross income tax provisions must also file quarterly returns if their gross income tax liability exceeds \$250 in any quarter. IND. CODE § 6-2-1-15(b) (Supp. 1976); GROSS INCOME REG., *supra*, at 6-2-1-15(010).

The Code provides for the payment of interest on refunds and the imposition of interest and various penalties on assessments. IND. CODE § 6-2-1-16(b), (c) (Supp. 1979) (providing for payment of 8% interest); *id.* § 6-2-1-16(d) (1976 & Supp. 1979) (providing for a 10% penalty in cases of negligence or intentional disregard of the law); *id.* § 6-2-1-16(e) (providing for a 50% penalty in cases of fraud); *id.* § 6-2-1-16(f) (providing for a 10% penalty for failure to file a return or pay the tax when due); *id.* § 6-2-1-16(g) (providing for a 20% penalty if the department prepares a return for a taxpayer who has failed to file a return or pay the tax within 20 days after being notified of his delinquency). Billings go through a normal collection cycle explained earlier. *See* notes 11-16 *supra* and accompanying text. The taxpayer also is afforded an opportunity to protest any refund or assessment and request an administrative hearing. *See* notes 18-20 *supra* and accompanying text.

¹⁶⁵The higher rate is imposed on commissions, fees, dividends, rents, leases, interest, sales of real estate, sales of securities, sales of capital assets, contractor service receipts, and other service receipts. IND. CODE § 6-2-1-3(g) (Supp. 1979). The lower rate is imposed on selling at retail, laundering and dry cleaning, industrial processing, wholesale sales, and contractor sales of materials. *Id.* § 6-2-1-3(a)-(d), (f).

¹⁶⁶*Id.* § 6-2-1-3.

¹⁶⁷*See id.* §§ 6-2-1-1(m), -6(b), (h), (n); *id.* §§ 6-2-1-9, -10; GROSS INCOME REG., *supra* note 151, at 6-2-1-1(m) (and listings thereunder), -6(020), -7(a)(100), (h)(010), (n)(010); *id.* at 6-2-1-9(010), -10(020).

receipts.¹⁶⁸ Further, a preferred tax treatment, referred to as gross earnings, is afforded to certain corporations.¹⁶⁹

In addition to the items excluded from gross income and the special treatment afforded certain taxpayers, there are a number of exemptions. The primary exemption is for receipts derived from interstate commerce.¹⁷⁰ Because the gross income tax affects many multistate corporations doing business in Indiana, this exemption provision is constantly at issue before the department in administrative hearings. Exemptions are also afforded for taxes collected by the taxpayer as an agent for Indiana or the United States government;¹⁷¹ sales to the United States government;¹⁷² life insurance proceeds;¹⁷³ all receipts of wholly exempt not-for-profit organizations (except for income from unrelated business activities);¹⁷⁴ certain federal retailers and manufacturers excise taxes;¹⁷⁵ dealer exchanges of new, untitled, and unregistered motor vehicles;¹⁷⁶ receipts from transportation of property by truck which is an initial, intermediate, or final step in interstate commerce.¹⁷⁷

The gross income tax amendments this session provided additional exemptions. Amounts received directly from a national broadcasting network for broadcasting national network programs are now exempt.¹⁷⁸ Also exempted is transportation income relating to shipments of property by rail which are an initial, intermediate, or

¹⁶⁸IND. CODE § 6-2-1-6(a) (Supp. 1979); GROSS INCOME REG., *supra* note 164, at 6-2-1-6(010).

¹⁶⁹Financial institutions, certain brokers, certain investment companies, certain leasing companies, life and fire and casualty insurance companies, grain dealers, sales of grain and soybeans under United States government regulations, wholesale grocers, softwater companies, and dealers in livestock. *Id.* § 6-2-1-1(n)-(u) (1976 & Supp. 1979). The term "gross earnings" is used here in an unorthodox sense; its common use is more closely associated with a net income concept.

¹⁷⁰*Id.* § 6-2-1-7(a); GROSS INCOME REG., *supra* note 164, at 6-2-1-7(a)(010)-(100).

¹⁷¹IND. CODE § 6-2-1-7(b) (1976 & Supp. 1979); GROSS INCOME REG., *supra* note 164, at 6-2-1-7(b)(010).

¹⁷²IND. CODE § 6-2-1-7(c) (1976 & Supp. 1979); GROSS INCOME REG., *supra* note 164, at 6-2-1-7(c)(010). These sales are exempt only if the United States Constitution or a federal statute prohibits their taxation.

¹⁷³IND. CODE § 6-2-1-7(d) (1976 & Supp. 1979); GROSS INCOME REG., *supra* note 164, at 6-2-1-7(d)(010).

¹⁷⁴IND. CODE § 6-2-1-7(i) (1976 & Supp. 1979); GROSS INCOME REG., *supra* note 164, at 6-2-1-7(i)(010)-(050). Taxation of unrelated business income is provided for by IND. CODE § 6-2-1-7.5 (Supp. 1979).

¹⁷⁵IND. CODE § 6-2-1-7(m) (1976 & Supp. 1979); GROSS INCOME REG., *supra* note 164, at 6-2-1-7(m)(010).

¹⁷⁶IND. CODE § 6-2-1-7(p) (1976 & Supp. 1979); GROSS INCOME REG., *supra* note 164, at 6-2-1-7(p)(010).

¹⁷⁷IND. CODE § 6-2-1-7(q) (Supp. 1979); GROSS INCOME REG., *supra* note 164, at 6-2-1-7(q)(010).

¹⁷⁸IND. CODE § 6-2-1-7(r) (Supp. 1979).

final link in interstate transportation.¹⁷⁹ This change corrects an oversight which occurred when this exemption was afforded to transportation of property by truck in 1978.¹⁸⁰ In response to the national concern for energy conservation, a new gross income tax deduction is available to taxpayers who have a resource recovery system which converts refuse, garbage, or rubbish into energy or useful products.¹⁸¹ The deduction is limited to the taxpayer's depreciation deduction allowed for the system under sections 167 and 179 of the Internal Revenue Code.¹⁸²

New gross income tax rules and regulations promulgated by the department went into effect December 14, 1978.¹⁸³ The division also issues information bulletins, private letter rulings, and summaries of administrative hearings.

During the last year, the courts decided several cases of importance, dealing with both procedural and substantive issues in the gross income tax area. The issue in *Indiana Department of State Revenue v. Hoosier Metal Fabricators*¹⁸⁴ was the imposition of the gross income tax on sales made f.o.b. to Pratt-Whitney, the taxpayer's Gas City, Indiana, plant. The taxpayer's customer employed quality control representatives who were present at Hoosier's plant three days a week. These representatives, however, had no authority to accept or reject parts for shipment. This function occurred at Pratt-Whitney facilities located out of state.

Although the State contended that the f.o.b. delivery term completed the sale within Indiana, thereby subjecting the income to tax, the issue was not preserved for appeal. Instead, the State and the taxpayer stipulated that the issue of taxability was determined by the place of acceptance or rejection by the nonresident buyer. The court of appeals held that this stipulation was binding and operated as a waiver of all other questions.¹⁸⁵ Because there was no evidence of acceptance or rejection of goods in the state, the trial court's finding of nontaxability was upheld. The concurring opinion indicated in dicta, however, that taxability would have resulted had the proper issue been before the court on appeal.¹⁸⁶

¹⁷⁹*Id.* § 6-2-1-7(q).

¹⁸⁰Act of Apr. 9, 1979, Pub. L. No. 51, § 2, 1979 Ind. Acts 225 (codified at IND. CODE § 6-2-1-7(q) (Supp. 1979)).

¹⁸¹*Id.* § 6-2-1-6.5 (Supp. 1979).

¹⁸²*Id.*

¹⁸³These regulations were promulgated pursuant to *id.* § 6-2-1-34(a) (1976 & Supp. 1979). The adoption of these regulations was of primary importance because *id.* § 6-2-1-34(d) (Supp. 1979) now requires departmental interpretations that could increase a taxpayer's gross income tax liability to be promulgated in rules or regulations.

¹⁸⁴386 N.E.2d 963 (Ind. Ct. App. 1979).

¹⁸⁵*Id.* at 964.

¹⁸⁶*Id.* at 965 (Sullivan, J., concurring).

*Indiana Department of State Revenue v. Beemer Enterprises*¹⁸⁷ concerned the taxability of commissions received in Indiana on sales made to the states of Illinois and Michigan. Beemer, an Indiana corporation with one employee, engaged four independent salesmen in Indiana, Illinois, and Michigan. Beemer had verbal agreements to sell products of Wood Metal Industries, Inc., a Pennsylvania corporation, within these same states. Products were shipped directly to Beemer's customers from Pennsylvania. A twelve percent commission was paid on each order, of which five percent went to Beemer and seven percent to the salesmen who placed the order. The court held that Beemer was properly taxed on commissions received on sales to its Indiana customers, but that the State was prohibited by the commerce and due process clauses of the United States Constitution,¹⁸⁸ and the interstate commerce exemption of the Gross Income Tax Act,¹⁸⁹ from taxing commissions which were generated by sales to Illinois and Michigan customers.¹⁹⁰

This decision is erroneous on several grounds. First, the entire twelve percent commission on each sale should be subject to tax under the "source of income test" enunciated in *Indiana Department of State Revenue v. Frank Purcell Walnut Lumber Co.*¹⁹¹ Second, the payment of commissions to independent salesmen constitutes a cost of doing business, for which no deduction is permitted under Indiana Code section 6-2-1-1(m).¹⁹² Third, Beemer did not establish that imposition of tax on commissions relating to Illinois and Michigan sales either burdened commerce or created a threat of multiple taxation.

*Park 100 Development Co. v. Indiana Department of State Revenue*¹⁹³ concerned the gross income tax treatment of partnerships. Park 100 Development Company is a partnership composed of one individual and two partnerships. One of the partnerships is composed of two partners which are both corporations. Under Indiana Code section 6-3-7-1(b),¹⁹⁴ Park 100 was taxed as a regular corporation under the Gross Income Tax Act on the basis that one of its partners was a corporation. The court of appeals held that Park 100 was not taxable under section 6-3-7-1(b) in that all members were either individuals or partners.¹⁹⁵ The fact that one of these partners was composed of two corporations did not change the fact that it

¹⁸⁷386 N.E.2d 187 (Ind. Ct. App. 1979).

¹⁸⁸U.S. CONST. art. I, § 8, cl. 3; *id.* amend. XIV. § 1.

¹⁸⁹IND. CODE § 6-2-1-1(m) (1976 & 1979 Supp.)

¹⁹⁰386 N.E.2d at 190.

¹⁹¹152 Ind. App. 122, 282 N.E.2d 336 (1972).

¹⁹²IND. CODE § 6-2-1-1(m) (1976 & Supp. 1979).

¹⁹³388 N.E.2d 293 (Ind. Ct. App. 1979).

¹⁹⁴IND. CODE § 6-3-7-1(b) (1976 & Supp. 1979).

¹⁹⁵388 N.E.2d at 295.

was a partnership under a strict interpretation of the statute. If this decision is upheld, tiered partnerships of this nature will receive a real competitive advantage over traditional corporate-partnerships now subject to gross income tax.

*Middleton Motors, Inc. v. Indiana Department of State Revenue*¹⁹⁶ dealt with common procedural requirements which must be complied with by all taxpayers seeking relief under various taxing statutes. The taxpayer in the case failed to file suit within three months after its claim for refund was denied, and the trial court dismissed the action for lack of jurisdiction. The taxpayer argued that the State should be estopped to rely on the procedural statute, Indiana Code section 6-2-1-19,¹⁹⁷ because it relied on erroneous representations from a department official who allegedly informed the taxpayer that it had two years from payment of the final installment of tax to file suit. In upholding the trial court's dismissal, the supreme court held that section 6-2-1-19 provided the exclusive remedy for the taxpayer.¹⁹⁸ Failure to comply with this procedural statute, therefore, precluded the taxpayer from instituting its suit. Citing the maxim that all persons are presumed to know the law,¹⁹⁹ the court found the taxpayer's reliance upon the erroneous representations of the department's deputy commissioner to be unjustified.²⁰⁰

Under Indiana law, a special tax break is afforded "industrial processing or servicing."²⁰¹ Rather than paying the higher rate normally assessed on service receipts, qualifying taxpayers pay the lower rate imposed on sales receipts.²⁰² In *Indiana Department of State Revenue v. Apex Steel & Supply Co.*,²⁰³ the court held that the taxpayer was entitled to treatment as an industrial processor or servicer.²⁰⁴ The taxpayer's business consisted of compressing and baling loose scrap steel for a steel manufacturer. The baled steel then became an integral part of property which the steel company manufactured for sale. The court rejected the State's contention that "processing" or "servicing" required the addition of other tangible personal property to the material being processed or serviced.²⁰⁵ The court also stated that in construing a statute phrases are to be

¹⁹⁶380 N.E.2d 79 (Ind. 1978).

¹⁹⁷IND. CODE § 6-2-1-19 (1976).

¹⁹⁸380 N.E.2d at 81.

¹⁹⁹*Id.* (citing *City of Evansville v. Follies*, 161 Ind. App. 396, 315 N.E.2d 724 (1974)).

²⁰⁰380 N.E.2d at 81.

²⁰¹IND. CODE § 6-2-1-3(a) (1976 & Supp. 1979).

²⁰²*Id.*

²⁰³375 N.E.2d 598 (Ind. Ct. App. 1979).

²⁰⁴*Id.* at 601.

²⁰⁵*Id.*

viewed in their plain and ordinary sense.²⁰⁶ This decision may cause a marked decrease in revenues as more taxpayers try to qualify for this special treatment. Corrective legislation will probably be required to offset the effects of this decision or to delete industrial servicing from low rate treatment.

*Indiana Department of State Revenue v. Northern Indiana Steel Supply Co.*²⁰⁷ concerned the amount of receipts subject to gross income tax upon the sale of personal property subject to security agreements. The department assessed the entire amount received from the sale, arguing that the purchaser's assumption and payment of the taxpayer's outstanding obligations on the equipment constituted constructive receipt of gross income. In upholding the granting of the taxpayer's motion for summary judgment, the court held that the taxpayer only received taxable gross income to the extent of its equity in the property and that there was no constructive receipt of income, either at the time of assumption of the indebtedness by the purchaser or at the time of his payment thereof, because the taxpayer received neither a credit nor a payment for its direct benefit.²⁰⁸

The result reached by the court is not supported by analogous statutory authority. A similar exemption for mortgage debts in real property sales was written into the law by judicial decision in 1952²⁰⁹ and is now codified at Indiana Code section 6-2-1-9.²¹⁰ Depending on the outcome of final appeals in this case, corrective legislation may be sought to specifically forbid deductions for encumbrances in personal property sales.

b. Adjusted gross income tax.—The Adjusted Gross Income Tax Act,²¹¹ applies to both corporate²¹² and individual taxpayers. Cor-

²⁰⁶*Id.*

²⁰⁷388 N.E.2d 596 (Ind. Ct. App. 1979).

²⁰⁸*Id.* at 599-600.

²⁰⁹*Indiana Dep't of State Revenue v. Crown Dev. Co.*, 231 Ind. 449, 109 N.E.2d 426 (1952); *Indiana Dep't of State Revenue v. Colpaert Realty Corp.*, 231 Ind. 463, 109 N.E.2d 415 (1952).

²¹⁰IND. CODE § 6-2-1-9 (1976).

²¹¹Act of Apr. 30, 1963, ch. 32, § 101, 1963 Ind. Acts 82 (1963) (Spec. Sess.) (codified at IND. CODE §§ 6-3-1-1 to -8-6 (1976 & Supp. 1979)).

²¹²The adjusted gross income tax provisions concerning the filing of returns, the payment of refunds, assessments, penalties, interest, and hearings are almost identical to the gross income tax provisions. Compare IND. CODE §§ 6-3-4-1 to -14 (1976 & Supp. 1979) (adjusted gross income tax) with gross income tax provisions discussed in note 164 *supra*. For adjusted gross income tax purposes, however, quarterly returns are required to be filed to reflect 25% of a taxpayer's liability if it exceeds \$1,000 for his taxable year. IND. CODE § 6-3-4-4(c) (1976 & Supp. 1979). Failure to report quarterly subjects the corporation to an 8% penalty. Corporations complying with the provisions of I.R.C. § 1502 may also file on a consolidated basis. IND. CODE § 6-3-4-14(a) (1976). Corporations must be eligible to file on a consolidated basis for federal income tax pur-

porate taxpayers pay the greater of the adjusted gross income tax, or gross income tax plus the supplemental net income tax.²¹³

(i.) *Corporations.*—The corporate adjusted gross income tax is computed by starting with taxable income under section 63 of the Internal Revenue Code and then making certain adjustments.²¹⁴ If a corporation's income is solely derived from Indiana income, the computation is complete. If income is derived from sources both within and without Indiana, the adjusted gross income is apportioned by use of a three-factor formula.²¹⁵ The factors reflect a taxpayer's property, payroll, and sales both within the state (reflected in the numerator) and everywhere (reflected in the denominator). The average of these three factors is then applied to the taxpayer's adjusted gross income to determine Indiana adjusted gross income. If the use of this three-factor formula does not fairly reflect a taxpayer's Indiana activity, the statute provides for the use of alternative methods.²¹⁶

Certain entities are not themselves subject to the tax. Not-for-profit organizations need not file a return unless they have unrelated business income.²¹⁷ Partnerships and Subchapter S corporations file a return, but the tax is imposed on the partners and shareholders respectively.²¹⁸

In computing their adjusted gross income tax, corporate taxpayers are entitled to certain credits. First, a credit of ten percent of its adjusted gross income tax or \$1,000, whichever is less, is afforded to corporations for contributions to Indiana colleges and

poses and have income derived from sources within the state. *Id.* Consistency in reporting on a consolidated basis for both gross and adjusted gross income tax purposes is important in order to ensure the proper allocation of all credits.

²¹³IND. CODE § 6-3-8-5 (1976). The corporate adjusted gross income tax rate is 3%, and the individual adjusted gross income tax rate is currently 1.9%. *Id.* § 6-3-2-1 (Supp. 1979) (effective Jan. 1, 1980).

²¹⁴*Id.* § 6-3-1-3.5(b) (Supp. 1979). The adjustments are as follows: (1) Deduct income exempt from tax by the United States Constitution and statutes; (2) add charitable deductions; and (3) add any deductions taken for state income and local property taxes on the taxpayer's federal return. *Id.*

²¹⁵*Id.* § 6-3-2-2(b)-(e) (1976).

²¹⁶*Id.* § 6-3-2-2(l) allows the use of separate accounting, the exclusion or inclusion of one or more factors, or the employment of any other method if the three-factor formula provided by *id.* § 6-3-2-2(b) fails to fairly reflect a taxpayer's income derived from sources in Indiana.

²¹⁷*Id.* § 6-3-2-3.1 (Supp. 1979). The Indiana statute adopts the definition of unrelated income in I.R.C § 513.

²¹⁸IND. CODE § 6-3-4-11 (1976) (partnerships); *id.* § 6-3-4-13 (1976 & Supp. 1979) (Subchapter S corporations). The returns filed by each of these entities are merely information returns unless the partnership or Subchapter S corporation has a use or intangibles tax liability.

universities.²¹⁹ Second, a credit is allowed for salaries and wages paid in training the hard-core unemployed in either basic skills or specific job skills.²²⁰ Third, a corporate taxpayer can receive a credit of up to \$25,000 for amounts invested in economically disadvantaged areas.²²¹

Indiana Department of Revenue v. Kimberly-Clark Corp.,²²² the first significant decision under Indiana's adjusted gross income tax, concerned the applicability of the adjusted gross income tax to the taxpayer's Indiana operations. During the years 1969 to 1971, Kimberly-Clark employed several salesmen who lived in Indiana but reported to out-of-state district offices. The activities of these salesmen in Indiana consisted of checking shelf facing, checking customer inventories, pricing products, stocking shelves, erecting displays, conveying information to customers concerning out-of-stock conditions or delays in shipments, verifying destruction of damaged merchandise for special promotions, and coordinating delivery of merchandise for special promotions. The issue for determination was whether these activities constituted mere solicitation under Public Law 86-272,²²³ thereby relieving Kimberly-Clark from Indiana's adjusted gross income tax. Although the first four activities constituted mere solicitation, the court of appeals held that the remaining three activities exceeded the immunity from state taxation afforded by Public Law 86-272 and provided a sufficient nexus for imposition of the adjusted gross income tax on income derived by Kimberly-Clark from sales into Indiana.²²⁴ Solicitation, according to the opinion, is limited to activities that lead to the placing of orders and does not include activities that follow as a natural result of the prior placing of orders, such as the servicing of prior accounts.²²⁵

The *Kimberly-Clark* decision is far from a definitive statement, however. In *Smith Kline & French Laboratories v. State Tax Commission*,²²⁶ the Oregon Supreme Court found that the activities of the taxpayer's detail men to be solicitation under Public Law 86-272.²²⁷

²¹⁹*Id.* § 6-3-3-5(c) (Supp. 1979). The credit is denied a corporate taxpayer who is not subject to the adjusted gross income tax. *Id.* § 6-3-3-5(a).

²²⁰*Id.* § 22-1-4-71 (1976 & Supp. 1978).

²²¹These neighborhood assistance credits are provided by *id.* § 6-3-3.1-1 to -7 (1976 & Supp. 1979). Economically disadvantaged areas are determined by the state department of commerce. *Id.* § 6-3-3.1-1(b) (Supp. 1979). A maximum of one million dollars in tax credits is available in each state fiscal year. *Id.* § 6-3-3.1-6 (1976).

²²²375 N.E.2d 1146 (Ind. Ct. App. 1978).

²²³15 U.S.C. § 381 (1976) (providing that income from interstate commerce may not be subject to state taxation if activity within the state consists only of solicitation).

²²⁴375 N.E.2d at 1151.

²²⁵*Id.* at 1150.

²²⁶241 Or. 50, 403 P.2d 375 (1965).

²²⁷*Id.* at 53, 403 P.2d at 377.

The court held that the exemption was to be afforded not only to certain specified sales efforts but also to "all lesser, [sic] included phases."²²⁸ By contrast, the same court in *Herff Jones Co. v. State Tax Commission*²²⁹ adopted a narrow interpretation of solicitation and found such activities as the receipt of ring deposits and subsequent collections to be beyond the protection of Public Law 86-272.²³⁰ In *CIBA Pharmaceutical Products, Inc. v. State Tax Commission*,²³¹ the Missouri Supreme Court held that the activities of the taxpayer's detail men constituted solicitation.²³² To the contrary is *Clairol, Inc. v. Kingsley*.²³³ In *Clairol*, the New Jersey court considered the economic substance of the taxpayer's activities and found that they exceeded the protections of Public Law 86-272.²³⁴ A similar result was reached by the Arkansas Supreme Court in *Hervey v. AMF Beaird, Inc.*²³⁵ Both of these cases premised taxability, in part, on the taxpayer's checking of inventories, a fact which was viewed by the Indiana Court of Appeals in *Kimberly-Clark* as an element of solicitation.²³⁶

These cases all illustrate attempts by state courts to wrestle with the applicability of Public Law 86-272 to their own tax laws. The constant litigation of this issue reveals failure of the federal law to establish guidelines as to what constitutes solicitation and indicates the need for uniform legislation or judicial guidance.

(ii.) *Individuals*.—The individual adjusted gross income tax is computed by starting with adjusted gross income under section 62 of the Internal Revenue Code and then making required adjustments.²³⁷ If the corporate or nonresident taxpayer has income

²²⁸*Id.*

²²⁹247 Or. 404, 430 P.2d 998 (1967).

²³⁰*Id.* at 422, 430 P.2d at 1002. See also *Olympia Brewing Co. v. Dep't of Revenue*, 266 Or. 309, 511 P.2d 837 (1973), *cert. denied*, 415 U.S. 976 (1974) (recognizing that salesman's activities did not exceed solicitation but holding that the presence of beer kegs in the state subjected the company to state corporate income tax); *Briggs & Stratton Corp. v. Commission*, 3 Or. T.R. 174 (1968) (holding that activities of the corporation's representatives were primarily to provide service but nonetheless subjected the corporation to tax).

²³¹382 S.W.2d 645 (Mo. 1964).

²³²*Id.* at 653.

²³³109 N.J. Super. 22, 262 A.2d 213 (Super. Ct. App. Div. 1970).

²³⁴*Id.* at 30, 262 A.2d at 217-18.

²³⁵25Q Ark. 147, 464 S.W.2d 557 (1971).

²³⁶375 N.E.2d at 1150.

²³⁷IND. CODE § 6-3-1-3.5(a) (1976 & Supp. 1979). The adjustments are calculated in the following manner: (1) Deduct income exempt from tax by the United States Constitution and statutes; (2) add any deductions taken for state income and local property taxes on the taxpayer's federal return; (3) add the ordinary income portion of a lump sum distribution; (4) deduct recoveries of items previously deducted as an itemized deduction for federal tax purposes; and (5) deduct supplemental railroad retirement an-

derived from sources both within and without the state, the three-factor formula previously discussed²³⁸ is used to determine Indiana adjusted gross income.²³⁹

By virtue of the Indiana Code's incorporation of the Internal Revenue Code, a taxpayer is also entitled to certain income exemptions.²⁴⁰ There is also a deduction for the first \$2,000 received from a civil service annuity by a taxpayer over age sixty-two.²⁴¹ In addition, a taxpayer can receive a \$2,000 military pay deduction, which applies to retirement or survivor benefits if the taxpayer is at least sixty-years old.²⁴² Finally, the Code provides for deductions of up to \$1,000 for amounts expended on residential insulation.²⁴³

The Code also provides for a number of credits to individual taxpayers, including a credit for tax withheld²⁴⁴ or paid to another state,²⁴⁵ for the elderly,²⁴⁶ for contributions to Indiana colleges and universities,²⁴⁷ for property tax paid by certain individuals who are disabled or elderly,²⁴⁸ for motor fuel taxes paid,²⁴⁹ and a credit for offsetting the sales and use taxes paid on utilities.²⁵⁰ Several credits are available only to the elderly.²⁵¹

Legislative changes in the adjusted gross income tax dealt almost exclusively with new or revised credits and deductions. A new adjusted gross income deduction is available for income taxed by an out-of-state locality.²⁵² The deduction is limited to the lesser of

nuities. *Id.* The state income and local property taxes added back are those paid on business and nonbusiness investment property and deducted in arriving at adjusted gross income for federal purposes. Any income and property taxes taken as itemized deductions on the federal return need not be added back.

²³⁸See note 215 *supra* and accompanying text.

²³⁹IND. CODE § 6-3-2-2(b) (1976).

²⁴⁰The exemptions are: (1) for each dependent, \$500, *id.* 6-3-1-3.5(a)(4) (1976 & Supp. 1979); (2) a special income exemption of up to \$500, *id.* § 6-3-1-3.5(a)(3); (3) if the taxpayer is blind, \$500, *id.* § 6-3-1-3.5(a)(4); (4) if the taxpayer is over age 65, \$1,000, *id.*

²⁴¹*Id.* § 6-3-2-3.7 (Supp. 1979). This amount is reduced by social security and railroad retirement benefits received by the taxpayer. *Id.*

²⁴²*Id.* § 6-3-2-4.

²⁴³*Id.* § 6-3-2-5. The deduction applies to expenditures for new insulation, weather stripping, double pane windows, storm windows, and storm doors in a residence at least three years old. *Id.*

²⁴⁴*Id.* § 6-3-3-1 (1976).

²⁴⁵*Id.* § 6-3-3-3.

²⁴⁶*Id.* § 6-3-3-4.1 (Supp. 1979).

²⁴⁷*Id.* § 6-3-3-5(b).

²⁴⁸*Id.* § 6-3-3-6 (1976).

²⁴⁹*Id.* § 6-3-3-7 (Supp. 1979).

²⁵⁰*Id.* § 6-3-3-8. The filing requirements for this credit are identical to those for the property tax credit.

²⁵¹See *id.* § 6-3-3-4.1; *id.* § 6-3-3-6 (1976).

²⁵²*Id.* § 6-3-2-5.5 (Supp. 1979).

the amount of an individual's adjusted gross income subject to an income tax imposed by another state or \$2,000.²⁵³

A new renter's deduction²⁵⁴ replaces the older renter's deduction which expired in 1975.²⁵⁵ The new deduction, limited to the lesser of the amount of rent paid or \$1,500, cannot be claimed if the property is exempt from Indiana property tax.²⁵⁶

In the most sweeping change in the law, all individuals will receive a credit of fifteen percent for tax years beginning in 1979.²⁵⁷ The credit is to be applied to the taxpayer's adjusted gross income tax liability before the application of any other credits. In addition, the individual adjusted gross income tax rate is reduced to 1.9%, effective January 1, 1980.²⁵⁸

The legislature also updated the Adjusted Gross Income Tax Act to include the latest rules and regulations of the Internal Revenue Code in effect on January 1, 1979.²⁵⁹ Thus, all federal income tax amendments taking effect on or before January 1, 1980, are incorporated by reference into title six, chapter three of the Indiana Code.²⁶⁰

(iii.) *Trusts and estates.*—The adjusted gross income tax of trusts and estates is computed by starting with taxable income as defined by section 641(b) of the Internal Revenue Code and deducting income exempted by the United States Constitution and federal statutes.²⁶¹ An exemption of \$600 is given to estates, \$100 to complex trusts, and \$300 to simple trusts.²⁶²

The entire body of federal law applies to the preparation and filing of Indiana fiduciary returns.²⁶³ In addition, fiduciaries are required to withhold tax on distributions of income, other than interest and dividends, made to nonresident beneficiaries.²⁶⁴

To implement the provisions of the Code, the department is in the process of promulgating new adjusted gross income tax rules and regulations. Additional publications now available to the public include information bulletins, private rulings, and summaries of administrative hearings.

²⁵³ *Id.*

²⁵⁴ *Id.* § 6-3-2-6.

²⁵⁵ *Id.* § 6-3-1-3.1 (1976).

²⁵⁶ *Id.* § 6-3-2-6 (Supp. 1979).

²⁵⁷ Act of Apr. 10, 1979, Pub. L. No. 68, § 8, 1979 Ind. Acts 275 (1979). This one-time credit was not codified.

²⁵⁸ IND. CODE § 6-3-2-1, -17.

²⁵⁹ *Id.* §§ 6-3-1-11, -17.

²⁶⁰ *Id.*

²⁶¹ *Id.* § 6-3-1-3.5(c) (1976).

²⁶² These exemptions are afforded by I.R.C. § 642(b), and are incorporated into the adjusted gross income tax by IND. CODE § 6-3-1-11 (Supp. 1979).

²⁶³ See IND. CODE § 6-3-1-17 (1976 & Supp. 1979).

²⁶⁴ *Id.* § 6-3-4-15 (Supp. 1979).

12. *Supplemental Net Income Tax.*—The supplemental net income tax is imposed on corporations, banks, trust companies, national banking associations, mutual savings banks, private banks, savings and loan companies, and domestic insurance companies.²⁶⁵ The tax is computed by deducting the greater of the taxpayer's gross income tax or adjusted gross income tax from his adjusted gross income.²⁶⁶ The remainder is subject to a three-percent tax.²⁶⁷

13. *County Adjusted Gross Income Tax.*—The county tax is imposed on taxpayers who reside in an adopting county or whose principal place of business is an adopting county as of January 1 of any given year.²⁶⁸

14. *Occupation Income Tax.*—A 1½% occupation income tax is imposed on personal service income of employees who devote more than 50% of their time performing work for their employer in the adopting county, city, or town.²⁶⁹ This tax is currently under attack in the courts and was declared unconstitutional by the Scott County Circuit Court in *Harris v. Clark*.²⁷⁰ In response to this decision, the department instructed employers to cease withholding this tax on October 20, 1978, pending final appeal of the decision.

15. *Intangibles Tax.*—The intangibles tax is imposed on all persons who exercise any of the privileges enumerated in Indiana Code section 6-5.1-3-1(a).²⁷¹ Persons subject to the tax include those who reside or are domiciled in Indiana and own or control an intangible

²⁶⁵*Id.* § 6-3-8-2(a) (1976).

²⁶⁶*Id.* § 6-3-8-2(b).

²⁶⁷*Id.* § 6-3-8-4.

²⁶⁸County taxpayers are defined in *id.* § 6-3.5-1-1(2) (1976 & Supp. 1979). The January 1 date is established by *id.* § 6-3.5-1-9(b) (1976 & Supp. 1979). The rate of tax, as adopted by the county, can be either ½, ¾, or 1% and is imposed on a taxing county resident's total adjusted gross income. *Id.* § 6-3.5-1-5 (1976). All people who work in an adopting county but live in a non-adopting county are subjected to a tax of ¼% on income earned in that county. *Id.*

²⁶⁹*Id.* § 6-3.5-3-1 (1976) defines occupation income. The tax rate is established by *id.* § 6-3.5-3-2(a).

²⁷⁰No. 77-C-109 (Scott Cir. Ct. Oct. 20, 1978). The attack on the tax was made because Indiana residents are exempt from the tax, except in the unusual situation where the 1½% occupation income tax liability exceeds their 2% adjusted gross income tax liability. By contrast, nonresidents principally employed in Indiana always pay the tax because they are exempt from Indiana's adjusted gross income tax by virtue of reciprocity agreements. IND. CODE § 6-3-5-1 (1976).

²⁷¹An exercise of any of the following privileges is subject to the tax:

- (1) Executing, selling, assigning, transferring, renewing, removing, consigning, mailing, shipping, trading-in, controlling, or enforcing an intangible;
- (2) Receiving income, increase, issues, or profits of an intangible;
- (3) Passing an intangible or income from an intangible to another person by will, gift, or intestate succession; or
- (4) Having an intangible classified for tax purposes.

IND. CODE § 6-5.1-2-1(a) (Supp. 1979).

in Indiana, or persons who own or control intangibles exercised in the course of maintaining or operating a business in Indiana.²⁷² Intangibles include such items as promissory notes, stock of foreign corporations, non-Indiana bonds, corporate bonds, debentures, money on deposit, loans of money, debt instruments, mortgages, installment sales contracts, accounts receivable reserving title or a security interest, brokerage account equity, capital notes, certificates of participation, commercial paper, dealer floor plans, investment certificates, repurchase agreements, and variable demand notes.²⁷³

Certain intangibles are exempt from tax: intangibles held by qualified not-for-profit organizations,²⁷⁴ stocks or bonds executed be-

²⁷²*Id.* While the law as recodified appears to apply only to persons residing or domiciled in the state, the department continues to apply the tax to nonresidents exercising taxable privileges in the course of their Indiana business. Taxation of nonresidents in this situation existed in the law before recodification. *Id.* § 6-5-1-1(k) (1976) (repealed 1977). Its omission was an oversight because a recodification cannot make substantive changes in the law.

The intangibles tax is normally paid annually on a taxpayer's income tax return and is due on the 15th day of the 4th month following the close of the taxpayer's taxable year. *Id.* § 6-5.1-6-1(b) (Supp. 1979). Qualified credit companies file either monthly or quarterly. *Id.* § 6-5.1-4-4.

The statutory provisions for assessment and refunds of the intangibles tax basically parallel those for the gross income tax and adjusted gross income tax with the exception that interest is six percent and a penalty of four times the unpaid tax can be assessed in addition to other penalties and interest if the taxpayer failed to pay his intangibles tax with intent to evade its payment. *Id.* § 6-5.1-9-5. There is no provision for waiver of any penalties.

²⁷³*Id.* § 6-5.1-1-1 (Supp. 1979). The valuation of intangibles is determined by whether it is classified as a current or annual intangible. A current intangible is one "designed to be and is matured, paid, discharged, or retired within one (1) year of its execution or issuance date." *Id.* § 6-5.1-1-2. Annual intangibles are all other intangibles. *Id.* § 6-5.1-1-3.

The valuation of annual intangibles varies with their characteristics. *Id.* § 6-5.1-3-2. Those traded on a recognized market are valued by taking the closing bid or sale price on the last market day of December. Those not traded on a recognized market are valued in the initial year of execution on the face value and on the total time balance due on the anniversary date of the execution. Other methods include average daily or monthly balance in the case of out-of-state deposits. Annual intangibles can also be valued by the department at valuation hearing.

Current intangibles are valued on their face value on the execution date. *Id.* § 6-5.1-3-3. "[I]f the intangible has a maturity date of ninety (90) days or less from the date of acquisition," the value is determined by multiplying the face value by a fraction, the numerator of which is the number of days the intangible is held and the denominator of which is 360. *Id.*

A special valuation method exists for qualified credit companies who elect to file and are granted permission to use the permit stamp method of reporting. *Id.* §§ 6-5.1-4-1 to -5. The benefit of filing on this basis is that the monthly tax is determined by multiplying the closing monthly ledger balances by the $\frac{1}{4}\%$ rate and then dividing by eight. *Id.* § 6-5.1-4-5.

²⁷⁴*Id.* § 6-5.1-5-1 (Supp. 1979). The eligible organizations are basically those enumerated in I.R.C. § 501(c)(3).

tween parent and subsidiary corporations if the parent owns at least eighty percent of the voting stock of the subsidiary,²⁷⁵ intangibles held by persons with under \$10,000 of household income,²⁷⁶ and qualifying pension and profit sharing plans.²⁷⁷ Section 6-5.1-5-7 of the Indiana Code²⁷⁸ enumerates an twenty additional types of exempt intangibles, and section 6-5.1-5-8²⁷⁹ incorporates other sections which grant exemptions from the intangibles tax.

The Indiana General Assembly echoed taxpayer displeasure with the intangibles tax by providing for a fifteen-year phaseout of the intangibles tax.²⁸⁰ The current rate of ¼ % will begin declining .17% a year beginning in 1982, with scheduled termination after 1995.²⁸¹

Another change provides a further advantage to mortgage lending companies who report their tax under the permit stamp method. These qualifying taxpayers will compute their monthly tax by dividing the annualized tax by twelve rather than eight, as is required of others using the permit stamp.²⁸²

B. State Board of Tax Commissioners

1. *Introduction.*—The State Board of Tax Commissioners is responsible for the assessment of property values on both real and personal property. The board is authorized by statute to construe the property tax laws of the state and instruct the various taxing officials in their duties with respect to taxation and assessment.²⁸³ The board is headed by a chairman and two commissioners.²⁸⁴ The day-to-day operations of the board are administered by the division of tax review,²⁸⁵ the division of property valuation,²⁸⁶ the division of

²⁷⁵IND. CODE § 6-5.1-5-2 (Supp. 1979).

²⁷⁶*Id.* § 6-5.1-5-3. This exemption is computed in the same manner as the property tax credit for the elderly under *id.* § 6-3-3-6(a) (1976).

²⁷⁷*Id.* § 6-5.1-5-5 (Supp. 1979). The exemption applies to plans qualified under I.R.C § 401.

²⁷⁸IND. CODE § 6-5.1-5-7 (Supp. 1979).

²⁷⁹*Id.* § 6-5.1-5-8.

²⁸⁰*Id.* § 6-5.1-2-2.

²⁸¹*Id.* (effective Jan. 1, 1980).

²⁸²*Id.* § 6-5.1-4-5.1.

²⁸³*Id.* § 6-1.1-30-14 (Supp. 1979) lists the powers and duties of the board.

²⁸⁴*Id.* § 6-1.1-30-1 (1976).

²⁸⁵*Id.* §§ 6-1.1-33-1 to -6. This division is responsible for auditing business personal property tax returns, hearing appeals filed by taxpayers, and making recommendations to the board for a final determination on the assessment of business property.

²⁸⁶The work of this division consists of holding hearings on petitions for reassessment, and hearing appeals on assessments and exemptions. *Id.* §§ 6-1.1-14-1 to -11 (1976 & Supp. 1979); *id.* §§ 6-1.1-15-1 to -13. The division is also responsible for conducting ratio studies for the state's school corporations and implementing new ratios and factors if substantial change is discovered. *Id.* § 6-1.1-34-1 to -12 (1976).

public utilities and railroads,²⁸⁷ and the division of budget review.²⁸⁸

2. *Property Taxes.—a. Tax rates.*—Each school corporation and civil taxing unit imposes its own tax rate.²⁸⁹ Property within a given taxing district is often subject to a variety of rates, including those imposed by a county, city, or school corporation. The tax is the product of assessed valuation times the tax rate per \$100 of assessed valuation.²⁹⁰ The assessed value is set at one-third of its true cash value.²⁹¹

Effective September 1, 1979, land classified as a wildlife habitat is assessed at one dollar per acre for property tax purposes. If the property is ever withdrawn from the wildlife habitat classification, the owner of the land must make a special tax payment.²⁹²

b. Assessment procedures.—Assessments are made in accordance with regulations issued by the board. The initial assessment of real property is made by the township assessor or trustee-assessor.²⁹³ Such assessments are subject to change by a county board of review on its own initiative or on appeal by the property owner.²⁹⁴ Either the assessing official or the property owner may appeal the county board's action directly to the State Board of Tax Commissioners.²⁹⁵

The initial assessment of personal property is made by the property owner.²⁹⁶ Any subsequent changes made by local assessing offi-

²⁸⁷Public utilities and railroads file their property tax returns directly with this division, which then determines assessments on a unit method. *Id.* §§ 6-1.1-8-9, -11, -19, -26. The taxpayer is entitled to protest the assessment made and request a hearing which is conducted by representatives of this division on behalf of the board. *Id.* §§ 6-1.1-8-28, -29. When the assessments are finalized, the division distributes the valuation to the taxing districts in which the property is located. *Id.* § 6-1.1-8-25(b). In addition to its dealings with public utilities and railroads, the division also assesses car line equipment companies. *Id.* §§ 6-1.1-8-12, -13 (1976 & Supp. 1979).

²⁸⁸This division has three major functions: to conduct hearings of budgets, levies and tax rates of local governmental units, *id.* §§ 6-1.1-17-1 to -19 (1976 & Supp. 1979); to conduct hearings when local governmental units request additional appropriations above the amounts budgeted, *id.* §§ 6-1.1-18-1 to -11; and to hold public hearings when a remonstrance is filed by taxpayers objecting to general obligations, bond issues, and lease rental agreements, *id.* §§ 6-1.1-20-1 to -9. The staff of this division also furnishes information to the school property tax control board and the local government property tax control board for use in appeals.

²⁸⁹*Id.* § 6-1.1-17-5 (1976).

²⁹⁰*Id.* § 6-1.1-2-3.

²⁹¹*Id.* § 6-1.1-1-3. This assessed value is determined by township and county officials yearly for personal property and every six years for real property. *Id.* §§ 6-1.1-2-2, -4-4 (1976 & Supp. 1979).

²⁹²*Id.* §§ 6-1.1-6.5-1 to -25 (Supp. 1979).

²⁹³Assessments of real property are made under *id.* §§ 6-1.1-4-1 to -30 (1976 & Supp. 1979).

²⁹⁴*Id.* §§ 6-1.1-13-1 to -12 (1976).

²⁹⁵*Id.* § 6-1.1-15-3 (Supp. 1979).

²⁹⁶Assessments of personal property are made under *id.* §§ 6-1.1-3-1 to -21 (1976 & Supp. 1979).

cials may be appealed in the same manner as for real property adjustments.

Property owned by public utilities is assessed by the board itself.²⁹⁷ Disputes with the assessments are handled by the board's division of public utilities and railroads.

All administrative actions of the State Board of Tax Commissioners are final. The board's action, however, can be set aside or subject to redetermination if suit is instituted and a court so orders.²⁹⁸

New legislation requires persons who reside in one township and have assessable personal property in another to submit evidence to their township of residence that a personal property tax has been filed in the township where the property is located.²⁹⁹ If the evidence is not filed within forty-five days, a penalty of ten percent of the tax liability is imposed.³⁰⁰ Another provision of the bill requires township assessors of Marion County to keep all property transfer books and to effect the transfer of title to real property.³⁰¹

c. Property tax exemptions.—Certain types of property are exempt from tax.³⁰² The legislature last term created a new exemption. Property shared by hospitals which would be exempt from property taxation if it were not shared and property owned by a shared hospital services organization which is used by a tax-exempt hospital are exempt from property taxation.³⁰³

The only noteworthy case during the survey period involving property tax was *Indiana State Board of Tax Commissioners v. News Publishing Co.*,³⁰⁴ which concerned the application of the personal property tax to newsprint imported from Canada but not required for the current needs of the taxpayer. The board appealed from a judgment which had allowed the taxpayer an exemption from tax on this property. In reversing the decision of the trial court, the appellate court noted that both article 10, section 1(a)(2) of the Indiana Constitution and the United States Supreme Court decision in *Michelin Tire Corp. v. Wages*³⁰⁵ warranted a contrary result.³⁰⁶ Indiana's constitution requires uniformity in property taxation and prohibits tax exemptions for personal property which is either held,

²⁹⁷*Id.* § 6-1.1-8-22 (1976).

²⁹⁸*Id.* § 6-1.1-15-5.

²⁹⁹*Id.* § 6-1.1-3-1(d) (Supp. 1979).

³⁰⁰*Id.* § 6-1.1-37-7.5.

³⁰¹*Id.* § 6-1.1-5-9.

³⁰²*Id.* §§ 6-1.1-10-1 to -38 (1976 & Supp. 1979).

³⁰³*Id.* § 6-1.1-10-16 (Supp. 1979).

³⁰⁴387 N.E.2d 488 (Ind. Ct. App. 1979).

³⁰⁵423 U.S. 276 (1976).

³⁰⁶387 N.E.2d at 491.

used, or consumed in the production of income.³⁰⁷ In *Michelin*, the Supreme Court upheld the validity of an ad valorem tax which did not discriminate against imports as such.³⁰⁸ Thus, the regulation, which exempted goods imported for the importer's own use which were not required for his current operations, was invalid, and the imposition of tax on the goods in question was proper.³⁰⁹

d. *Property tax deductions.*—The Indiana Code provides a number of deductions which primarily benefit homeowners. For example, taxpayers rehabilitating residential real property, buildings, and structures more than ten years old or making improvements in designated urban development areas receive various deductions.³¹⁰ The current energy crisis paved the way for recognition of a solar energy deduction.³¹¹ The legislature has established a new valuation method for purposes of computing the solar energy property tax deduction.³¹² The primary factor is "the cost of the system components that are unique to the system and that are needed to collect, store, or distribute solar energy."³¹³ A new deduction will also be available in 1980 for wind power devices which use the energy of moving air to create mechanical energy or produce electricity.³¹⁴ The deduction is the difference between the assessed value of the property with the device and without the device.³¹⁵

Other deductions relating to personal residences are listed below. First, a resident taxpayer owning real estate secured by a mortgage can receive a yearly deduction of up to \$1,000.³¹⁶ Second, certain persons age sixty-five or over are entitled to a \$1,000 deduction if they have combined gross income of less than \$10,000, own the property for at least one year, reside on the property, receive no other property tax deduction, and the assessed value of the property does not exceed \$9,000.³¹⁷ New legislation also affords additional tax benefits for the elderly. The property tax deduction has been extended to owners of mobile homes which are not assessed as real property.³¹⁸ In addition, persons sixty-five or older may claim both the standard mortgage deduction and the old age property tax

³⁰⁷*Id.* at 490. See IND. CONST. art. 10, § 1.

³⁰⁸423 U.S. at 301.

³⁰⁹387 N.E.2d at 491.

³¹⁰IND. CODE §§ 6-1.1-12-18 to -25 (1976 & Supp. 1979).

³¹¹*Id.* §§ 6-1.1-12-26 to -27.

³¹²*Id.* § 6-1.1-12-26(b) (Supp. 1979).

³¹³*Id.* § 6-1.1-12-26(b)(1).

³¹⁴*Id.* §§ 6-1.1-12-29, -30.

³¹⁵*Id.* § 6-1.1-12-29(b).

³¹⁶*Id.* § 6-1.1-12-1 (1976).

³¹⁷*Id.* § 6-1.1-12-9 (Supp. 1979).

³¹⁸*Id.*

deduction.³¹⁹ Third, the \$2,000 deduction available to blind persons has been expanded to include those with taxable gross income of \$7,500 or less who use or occupy the real property as a residence.³²⁰ Fourth, a partially disabled veteran can receive a \$2,000 deduction.³²¹ Fifth, a totally disabled veteran is entitled to a \$1,000 deduction unless the assessed value of the property exceeds \$6,500.³²² Finally, a World War I veteran may receive a \$3,000 deduction if the property is used as a principal residence, has been owned for at least a year, and has an assessed value of not more than \$14,000.³²³

Of interest to industry is a new provision allowing a deduction for resource recovery systems of ninety-five percent of the system's assessed value.³²⁴

e. Property tax credits.—Each year, taxpayers are provided a credit equal to twenty percent of their property tax bill.³²⁵ Additional relief is given to taxpayers who reside in counties which have adopted the county adjusted gross income tax. This program is made possible by virtue of the property tax replacement credits received by each county which replace property taxes that would have otherwise been levied.³²⁶

The property tax replacement credits are funded by fifty percent of the sales and use tax collections.³²⁷ Collections of county adjusted gross income tax are used to fund the local option credit.³²⁸

New legislation of most benefit to taxpayers is the new homestead credit, which provides an additional property tax credit of ten percent for property taxes paid on a homestead.³²⁹ The credit decreases two percent a year until its scheduled termination in 1985.³³⁰

³¹⁹*Id.* § 6-1.1-12-9.1.

³²⁰*Id.* § 6-1.1-12-11.

³²¹*Id.* § 6-1.1-12-13 (1976).

³²²*Id.* § 6-1.1-12-14.

³²³*Id.* § 6-1.1-12-17.4 (Supp. 1979).

³²⁴*Id.* §§ 6-1.1-12-28.5, -28.6. *See also* note 181 *supra* and accompanying text.

³²⁵*Id.* § 6-1.1-21-5 (1976).

³²⁶*Id.* § 6-1.1-21-4 (1976 & Supp. 1979).

³²⁷*Id.* § 6-2-1-53 (1976).

³²⁸*Id.* § 6-3.5-1-7 (Supp. 1979).

³²⁹*Id.* §§ 6-1.1-20.9-1 to -6.

³³⁰*Id.* § 6-1.1-20.9-2(d).

II. Administrative Law

Harold Greenberg*

A. Scope of Judicial Review

Confusion and uncertainty continue as to the scope of judicial review of administrative decisions. As noted in the 1977 Administrative law Survey,¹ the source of the confusion is differing interpretations of the "substantial evidence test" by the various Indiana courts.² The question remains: In looking for substantial evidence to support an administrative ruling, does the court examine all the evidence or merely the evidence most favorable to the successful party; that is, is the review on the whole record or only one-sided?

The court of appeals for the second district continues its adherence to the principle of whole-record review as enunciated by it in *City of Evansville v. Southern Indiana Gas & Electric Co.*,³ and repeated in *L.S. Ayres & Co. v. Indianapolis Power & Light Co.*⁴ In *Podgor v. Indiana University*,⁵ the second district panel again stated:

It is equally well settled that in determining the "substantiality" of the evidence, the reviewing court must consider the evidence in opposition to the challenged finding of basic fact as well as the evidence which tends to support the finding. As Justice Frankfurter said: "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB* (1951), 340 U.S. 474, 488⁶

Conversely, the first district court of appeals follows the one-sided approach, which it set forth in *Indiana Civil Rights Commission v. Holman*:⁷

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¹Utken, *Administrative Law, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 20 (1978).

²*Id.* at 23-27.

³339 N.E.2d 562, 573 (Ind. Ct. App. 1975), discussed in Shaffer, *Administrative Law, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 37, 37 (1976).

⁴351 N.E.2d 814, 823 (Ind. Ct. App. 1976), discussed in Utken, *supra* note 1, at 24.

⁵381 N.E.2d 1274 (Ind. Ct. App. 1978).

⁶*Id.* at 1280 (quoting *L.S. Ayres & Co. v. Indianapolis Power & Light Co.*, 351 N.E.2d at 823-24; *Southern Ind. Gas & Elec. Co.*, 339 N.E.2d at 573).

⁷380 N.E.2d 1281 (Ind. Ct. App. 1978).

In a judicial review of an administrative proceeding a trial court is not free to weigh the evidence, but must look at the evidence most favorable to the party who prevailed in the administrative proceeding in an effort to determine whether or not there exists substantial and probative evidence which would support the findings and decision of the administrative agency.⁸

Further analysis of the substantial evidence test by the first district court of appeals in *State ex rel. Department of Natural Resources v. Lehman*⁹ adds to the problem. In the 1977 Survey, the author observed that the first district court applied one-sided review of the record in *Indiana Education Employment Relations Board v. Board of School Trustees*¹⁰ when it inquired whether there was "any evidence to support" the ruling of the administrative agency.¹¹ In *Lehman*, the court responded to the Survey author's observation:

This is not to suggest that *any* evidence supportive of an agency's determination requires a reviewing court's affirmance; we are not expounding such a standard nor could we since [section] 4-22-1-18 requires "substantial evidence."

. . . .

In our opinion, where a reasonable person would conclude that the evidence as presented, with its logical and reasonable inferences, was of such a substantial character and probative value so as to support the administrative determination, then the substantial evidence standard required by [section] 4-22-1-18 has been met. Substantial evidence requires something more than a scintilla and something less than a preponderance of the evidence. The administrative determination must be soundly based in evidence and inferences flowing therefrom.¹²

The court's analysis does not really respond to the Survey comment, since the court's discussion can apply as well to a one-sided review as to a review of the whole record. Furthermore, since

⁸*Id.* at 1284 (citing *Department of Fin. Inst. v. State Bank of Lizton*, 253 Ind. 172, 252 N.E.2d 248 (1969)).

⁹378 N.E.2d 31 (Ind. Ct. App. 1978).

¹⁰355 N.E.2d 269 (Ind. Ct. App. 1976).

¹¹Utken, *supra* note 1, at 25.

¹²378 N.E.2d at 36 (footnotes omitted). Section 18 of the Administrative Adjudication Act, IND. CODE § 4-22-1-18 (1976), mandates that if an agency's determination "is supported by substantial, reliable and probative evidence, . . . [it] shall not be set aside or disturbed." However, if the court finds, *inter alia*, that the determination is "[u]nsupported by substantial evidence, the court may order the decision or determination of the agency set aside."

Holman was decided approximately three months after *Lehman*, one-sided review appears to be firmly established as proper in the first district.

The court of appeals for the third and fourth districts also search for "any substantial evidence,"¹³ but the third district, in *Johnson County REMC v. Public Service Commission*,¹⁴ cited *L.S. Ayres* and *City of Evansville* and declared that the court must determine "whether there is substantial evidence in light of the whole record to support the Commission's findings of basic facts."¹⁵

Compounding the present confusion is *Capital Improvement Board of Managers v. Public Service Commission*,¹⁶ in which a panel of judges from the first and third districts,¹⁷ sitting as the second district court of appeals, cited a whole record review case, *L.S. Ayres*, as having restated the standard to be applied,¹⁸ but then quoted from a one-sided review case, *Boone County REMC v. Public Service Commission*,¹⁹ that under the substantial evidence test, "'so long as there is *any* substantial evidence to support the rates fixed by the Commission as reasonable, the judicial branch of the government will not interfere with such legislative functions.'"²⁰

Decisions of the Indiana Supreme Court offer little guidance. The leading case is *Department of Financial Institutions v. State Bank of Lizton*,²¹ in which the court stated: "The court's only right or scope of review is limited to a consideration of whether or not there is *any* substantial evidence to support the finding and order of the administrative body."²² But in the current survey period, the supreme court stated in *Hawley v. South Bend Department of Re-*

¹³*Indiana Educ. Emp. Rel. Bd. v. Board of School Trustees*, 377 N.E.2d 414, 416 (Ind. Ct. App. 1978) (3d Dist.) ("If there is any substantial evidence to support the finding of the board or agency . . ."); *Indiana State Bd. of Reg. and Educ. for Health Facility Adm'rs v. Cummings*, 387 N.E.2d 491, 493 (Ind. Ct. App. 1979) (4th Dist.) (quoting *Department of Fin. Inst. v. State Bank of Lizton*, 253 Ind. 172, 176, 252 N.E.2d 248, 250 (1969) ("whether or not there is any substantial evidence to support the finding and order of the administrative body."))

¹⁴378 N.E.2d 1 (Ind. Ct. App. 1978).

¹⁵*Id.* at 6. Two cases decided after the survey period indicate rather clearly that the third and fourth district courts of appeals now adhere to whole record review. In *Indiana Civil Rights Comm'n v. Sutherland Lumber*, 394 N.E.2d 949, 952 (Ind. Ct. App. 1979), the third district repeated the whole record standard as well as the quotation from *City of Evansville* which appeared in *Podgor v. Indiana University*. See notes 3-6 *supra* and accompanying text. The fourth district cited both *City of Evansville* and *L. S. Ayres* and applied the whole record standard in *Old State Utility Corp. v. Greenbriar Dev. Corp.*, 393 N.E.2d 785, 789 (Ind. Ct. App. 1979).

¹⁶375 N.E.2d 616 (Ind. Ct. App. 1978).

¹⁷Lybrook, P.J. (1st Dist.); Garrard, P.J., & Hoffman, J. (3d Dist.).

¹⁸375 N.E.2d at 622.

¹⁹239 Ind. 525, 159 N.E.2d 121 (1959).

²⁰375 N.E.2d at 622 (quoting 239 Ind. at 532, 159 N.E.2d at 124) (emphasis added)).

²¹253 Ind. 172, 252 N.E.2d 248 (1969).

²²*Id.* at 176, 252 N.E.2d at 250 (emphasis added).

development.²³ "So long as there is substantial evidence of probative value in the record to support the findings [of the administrative agency] . . . ,"²⁴ requirements of due process are satisfied. The uncertainty continues.

B. Hearsay Evidence in Administrative Proceedings

1. *The Residuum Rule*.—In *C.T.S. Corp. v. Schoulton*,²⁵ the Indiana Supreme Court restated and reaffirmed the "residuum rule," which directs that an administrative decision not be based on inadmissible hearsay evidence admitted over objection unless there is a "residuum" of competent evidence to support the decision.²⁶ In this workmen's compensation case, the industrial board awarded benefits to the estate of a deceased employee after the board found that the employee had died as the result of over-exposure to toxic cleaning solvent fumes in an industrial accident. The only evidence of the accident was the treating physician's testimony that during the employee's hospitalization, he had asked the employee about exposure to solvents. The employee responded that he had spilled a container of solvent and "that he got down an cleaned it up."²⁷ It was undisputed that a toxic solvent was used for many purposes in the employer's plant. Although the employee had a history of alcoholism and infectious hepatitis, the autopsy disclosed that neither was the cause of death.

The second district court of appeals, over a vigorous dissenting opinion by Chief Judge Buchanan, affirmed the award.²⁸ Citing to strong criticism of the residuum rule by Professor Davis²⁹ and the erosion of the rule in New York, where it originated,³⁰ the court of

²³383 N.E.2d 333 (Ind. 1978).

²⁴*Id.* at 337.

²⁵383 N.E.2d 293 (Ind. 1978). For additional discussion of *C.T.S. Corp. v. Schoulton*, see Arthur, *Workmen's Compensation, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 439, 447-55 (1980), and Karlson, *Evidence, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 260, 260-62 (1980).

²⁶383 N.E.2d at 295-96.

²⁷*Id.* at 294.

²⁸354 N.E.2d 324 (Ind. Ct. App. 1976). It should be noted that in the course of his dissenting opinion, Chief Judge Buchanan stated: "This case possibly could be disposed of under an established exception to the Hearsay Rule for statements made to a treating physician concerning the cause or external source of an illness or condition made for the purpose of diagnosis and treatment." *Id.* at 331 (Buchanan, C.J., dissenting). The clear implication is that the residuum rule was not even applicable because the evidence was properly admissible. For additional discussion of this issue, see Karlson, *supra* note 25, at 260-62.

²⁹See 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.10 (1958).

³⁰*Compare* Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507 (1916) (the seminal case) with, e.g., Altshuler v. Bressler, 289 N.Y. 463, 46 N.E.2d 886 (1943). The only evidence in *Altshuler* of the actual cause of the deceased employee's coronary occlusion was the hearsay testimony of his wife and another person that the decedent

appeals rejected the residuum rule and held that if reliance on hearsay is necessary and the hearsay itself is trustworthy, an award may be based on the hearsay evidence. The court found that the evidence in question satisfied both requirements: it was necessary because of the employee's death and the absence of other witnesses to the accident, and it was trustworthy because it was given in response to inquiry by the treating physician.³¹

The Indiana Supreme Court granted transfer, adopted the views of Chief Judge Buchanan, reversed the award, and remanded the matter for rehearing by the industrial board.³² The court observed that under the residuum rule as applied in Indiana hearsay evidence may be admitted in an administrative hearing, and that, although such admission is improper, it will not be grounds for automatic reversal. When proper objection is made to evidence which is within the proscription of the hearsay rule, the evidence may not be the sole basis of the award. Rather, it must be supported by a residuum of competent evidence. However, if not objected to, the hearsay may form the basis of the decision just as it may in any courtroom proceeding.³³

Professor Davis has long been a critic of the residuum rule.³⁴ His strongest argument against it is "the lack of correlation between reliability of evidence and the exclusionary rules of evidence."³⁵ Wigmore states, for the same reason, that the rule "is decidedly not the wise and satisfactory rule for general adoption."³⁶ Professor Cooper lists twenty-one states in which the residuum rule has some vitality, but expresses doubt about the rule's survival as a general requirement because, even in those states which follow the rule, the tendency is not to apply it rigidly.³⁷

told them he had lifted a heavy object. The medical evidence was that such lifting could cause an occlusion, and there was evidence that the employees did work with the object which the decedent was said to have lifted. The court stated that there was "no substantial testimony to show that an accident did not occur as narrated by the injured employee, and established 'facts and circumstances' leave little reasonable doubt that the narration is substantially true." 289 N.Y. at 470, 46 N.E.2d at 889.

There is no meaningful difference between *Altshuller* and *C.T.S. Corp. v. Schoulton*. Although the New York statute involved did require the hearing board to admit the hearsay evidence, it could not serve as the basis of the decision without corroboration. Similarly, in Indiana, once the hearsay is admitted, corroboration by a residuum of evidence is still required. Thus, even applying the residuum rule, it should have been possible for the court to affirm the award in *Schoulton*.

³¹354 N.E.2d at 327-29.

³²383 N.E.2d at 294, 296-97.

³³*Id.*

³⁴See 2 K. DAVIS, ADMINISTRATIVE LAW TEXT § 14.09 (3d ed. 1972); 2 K. DAVIS, *supra* note 29, § 14.10; Davis, *The Residuum Rule in Administrative Law*, 28 ROCKY MTN. L. REV. 1 (1955).

³⁵2 K. DAVIS, *supra* note 29, § 14.10, at 295.

³⁶J. WIGMORE, 1 EVIDENCE IN TRIALS AT COMMON LAW § 4b, at 42 (3d ed. 1940).

³⁷1 F. COOPER, STATE ADMINISTRATIVE LAW 406-11 (1965).

The fact that ordinarily incompetent hearsay may be relied upon when no objection is raised³⁸ indicates quite clearly that hearsay is neither inherently unreliable nor lacking in probative value.³⁹ The supreme court expressed concern that rejection of the residuum rule would conflict with the well-established principle that the appellate courts may not determine the weight of evidence or credibility of witnesses.⁴⁰ To the contrary, rejection of the residuum rule would not require courts to operate differently. Courts would continue their present practice of determining, without "weighing" the evidence, whether the administrative decision is supported by substantial evidence,⁴¹ which is "'such relevant evidence as a reasonable mind might accept as sufficient to support a conclusion'"⁴² and is "of such a substantial character and probative value so as to support the administrative determination."⁴³ If the hearsay is not trustworthy in the sense that a reasonable mind would not accept it, or if it is of little probative value, then it could not support the result whether or not the residuum rule applied. The reviewing court will not "weigh" the hearsay to any greater or lesser extent than it "weighs" other evidence in determining substantiality.

Furthermore, since it is improper, but not reversible error, to admit hearsay over objection,⁴⁴ it is illogical to convert improperly admitted evidence into the basis of an administrative decision because there is also a supporting residuum of evidence which, by definition, is less than the substantial evidence required to support the decision. If the residuum were substantial evidence, the residuum rule and the problems with it would be superfluous because there would be substantial evidence in the record, apart from the hearsay, to support the decision.

The residuum rule as applied in Indiana creates a further problem. Because the supreme court is unwilling to abolish the hearsay rule in administrative proceedings⁴⁵ (despite the legislative mandate that technical common law rules of evidence not be applied⁴⁶), an administrative hearing officer may properly sustain an objection to

³⁸*C.T.S. Corp. v. Schoulton*, 383 N.E.2d at 297; *Turentine v. State*, 384 N.E.2d 1119, 1121-22 (Ind. Ct. App. 1979) (citing *Schoulton*).

³⁹*See Seymour Nat'l Bank v. State*, 384 N.E.2d at 1121-22.

⁴⁰383 N.E.2d at 296.

⁴¹*See* text accompanying notes 1-24 *supra*.

⁴²*Siddiqi v. Review Bd. of Ind. Employment Security Div.*, 388 N.E.2d 613, 618 (Ind. Ct. App. 1979) (quoting *Vonville v. Dexter*, 118 Ind. App. 187, 208, 77 N.E.2d 759, 760 (1948)).

⁴³*Department of Natural Resources v. Lehman*, 378 N.E.2d 31, 36 (Ind. Ct. App. 1978).

⁴⁴383 N.E.2d at 296.

⁴⁵*Id.*

⁴⁶Administrative Adjudication Act, IND. CODE § 4-22-1-8 (1976).

and exclude plainly reliable and probative, although technically inadmissible, hearsay evidence either before or after the required residuum of competent evidence is in the record. The claimant would thus be precluded from proving his case by evidence which the supreme court has held may be a basis for an award because the supreme court has also stated that the administrative hearing officer may exclude that evidence. Such a result is patently illogical and unjust. Nevertheless, the residuum rule is in force in Indiana and will be applied in those cases which depend exclusively on hearsay evidence to justify the decision of the administrative officer.

2. *Expert Testimony.*—In *Capital Improvement Board of Managers v. Public Service Commission*,⁴⁷ intervenors opposing an increase in steam rates had objected to the testimony of an expert who had relied on a report prepared by others. Without referring to the residuum rule⁴⁸ by name, the court first observed that administrative action may not be based on hearsay alone, but must be corroborated by other competent evidence.⁴⁹ The court then restated the rule that “the opinion of an expert witness that is based in part on hearsay customarily relied upon by such experts is properly admissible.”⁵⁰ In this case, the expert did not offer the earlier report as evidence but testified that he had used the report in compiling his own study. His testimony and his study were therefore admissible.

C. Procedural Due Process

*Wilson v. Review Board of Indiana Employment Security Division*⁵¹ was favorably reviewed in the 1978 Survey.⁵² During the current survey period, the Indiana Supreme Court granted transfer, vacated, and remanded *Wilson*.⁵³ The appellant Wilson had begun receiving unemployment benefits in November 1976. In December, her former employer submitted a report stating that she had refused an offer of suitable work. When she appeared to file her weekly claim, a deputy informed her that her benefits were being

⁴⁷375 N.E.2d 616 (Ind. Ct. App. 1978).

⁴⁸See text accompanying notes 25-46 *supra*.

⁴⁹375 N.E.2d at 624.

⁵⁰*Id.* at 626. Query: In *C.T.S. v. Schoulton*, was not the doctor's testimony that the employee had died as a result of over-exposure to toxic fumes rather than from cirrhosis or hepatitis admissible under this rule? And did not the evidence that the employee worked with that solvent at his job constitute a sufficient residuum?

⁵¹373 N.E.2d 331 (Ind. Ct. App. 1978), *vacated*, 385 N.E.2d 438 (Ind. 1979). See additional discussion in Darko, *Labor Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 295, 295-98 (1980).

⁵²See Price, *Administrative Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 30, 41-42 (1979).

⁵³385 N.E.2d 438 (Ind. 1979).

suspended effective immediately. Wilson filed a complaint seeking declaratory and injunctive relief, which the trial court dismissed. Concurrently, she requested a full hearing before a referee pursuant to the applicable administrative procedures. At that hearing, some thirty-six days after the suspension and twenty-three days after her request, the referee upheld the suspension, and was subsequently affirmed by the board.

The court of appeals held that Wilson had been deprived of a property right entitled to the protection of constitutional due process,⁵⁴ and that under the relevant statute⁵⁵ she was entitled to a hearing prior to termination of benefits.⁵⁶ Although based essentially on interpretation of the statute, the opinion also analyzed due process requirements in support of the decision.⁵⁷

The Indiana Supreme Court vacated the opinion of the court of appeals and remanded to the trial court with instructions to enter judgment for the defendant-appellee.⁵⁸ The higher court agreed with the court of appeals that Wilson had a constitutionally protected property interest in continued receipt of unemployment benefits, but concluded that a prompt post-termination hearing is sufficient to meet the requirements of due process, and found the Indiana procedures to be sufficiently speedy.⁵⁹

The supreme court's due process conclusion relies on two cases, *Torres v. New York State Department of Labor*⁶⁰ and *Fusari v.*

⁵⁴U.S. CONST. amend. XIV.

⁵⁵IND. CODE § 22-4-17-2(e) (Supp. 1979). The statute provides, *inter alia*:

In cases where the claimant's benefit eligibility or disqualification is disputed, the division shall promptly notify the claimant and the employer or employers directly involved or connected with the issue raised as to the validity of such claim, the eligibility of the claimant for waiting period credit or benefits, or the imposition of a disqualification period or penalty, or the denial thereof, and of . . . the cause for which the claimant left his work, of such determination and the reasons thereof. . . . Unless the claimant or such employer asks a hearing before a referee thereon, such decision shall be final and benefits shall be paid or denied in accordance therewith. . . . In the event a hearing is requested by an employer or the division after it had been administratively determined that benefits should be allowed to a claimant, entitled benefits shall continue to be paid to said claimant unless said administrative determination has been reversed by a due process hearing.

⁵⁶373 N.E.2d at 340-44.

⁵⁷*Id.* at 339.

⁵⁸385 N.E.2d at 446.

⁵⁹*Id.* at 443, 445-46. The supreme court did not deal directly with the statutory construction issue, which was the basis of the decision of the court of appeals. One can only infer from the fact that the supreme court reached the constitutional issue that it also disagreed with the court of appeals as to the proper interpretation of the applicable statute.

⁶⁰333 F. Supp. 341 (S.D.N.Y. 1971), *aff'd*, 405 U.S. 949 (1972). An earlier appeal in *Torres* had been remanded to the district court by the United States Supreme Court,

Steinberg.⁶¹ Neither case directly addressed the constitutional issue or furnished a solid foundation for the supreme court's decision in *Wilson*. Although the court in *Wilson* characterized the New York procedure applicable in *Torres* as providing claimants "with a post-termination hearing in substantially the same manner as Indiana,"⁶² the district court opinion in *Torres* stated unequivocally that there was also a pre-termination hearing:

This decision [that benefits were not "due" under the Social Security Act] was made after a hearing procedure identical to that initially used to determine eligibility. The *hearing procedure prior to the suspension of benefits* involved an interview, at which claimant had an opportunity to present information favorable to his version of the facts or unfavorable to that of his employer, and to answer charges.⁶³

No such procedure appeared in *Wilson*. The appellant was merely informed that her benefits were being suspended. As Justice DeBruler observed in his dissenting opinion, under the described Indiana procedure, "no requirement is imposed upon the deputy to weigh any answer given by the claimant to the charges of the employer . . . in the course of making a determination of ineligibility or disqualification."⁶⁴

In *Wilson*, the court compared *Torres* with *California Department of Human Resources Development v. Java*,⁶⁵ in which the United States Supreme Court held that a hearing was required prior to termination of benefits "due" under the terms of the Social Security Act.⁶⁶ The *Wilson* court concluded, first, that the *Torres* court had distinguished *Java* because the benefits in *Torres* were not "due" under the Social Security Act and, second, that because *Torres* was more like *Wilson* than *Java*, *Torres* controlled.⁶⁷ Although the Supreme Court affirmed *Torres* summarily,⁶⁸ it has since cautioned that *Torres* should not be read broadly, because to do so would leave little vitality to *Java*. A narrow construction is

402 U.S. 968 (1971), for reconsideration in light of *California Dept. of Human Resources Dev. v. Java*, 402 U.S. 121 (1971), which had construed the payment "when due" requirement of the Social Security Act, 42 U.S.C. § 503(a) (1976), as mandating a pretermination hearing when unemployment benefits were to be discontinued. *Torres* also depended on a construction of that language.

⁶¹419 U.S. 379 (1975).

⁶²385 N.E.2d at 444.

⁶³333 F. Supp. at 344 (emphasis added).

⁶⁴385 N.E.2d at 446 (DeBruler, J., dissenting).

⁶⁵402 U.S. 121 (1971).

⁶⁶*Id.* at 133. See 42 U.S.C. § 503(a) (1976).

⁶⁷385 N.E.2d at 444.

⁶⁸405 U.S. at 949.

more appropriate.⁶⁹ Moreover, the Court in *Fusari* refused to identify the factors in *Torres* which justified summary affirmance.⁷⁰

In *Fusari*, the Connecticut procedure which provided for post-termination hearing was modified after the case had been appealed to the United States Supreme Court to provide more rapid, but still post-termination, hearings. The Supreme Court refused to rule on the merits, and remanded for reconsideration in light of the new state procedures.⁷¹ The Indiana Supreme Court comment in *Wilson*, that had due process required a *pre*-termination hearing the United States Supreme Court would not have remanded,⁷² ignores the statement in *Fusari* that the Court felt "compelled to re-examine a statutory claim that may be dispositive *before* considering a difficult constitutional issue."⁷³ *Fusari* expressly recognized that the record therein was an entirely inadequate basis on which to determine either the statutory or constitutional claim, and refused to do so.⁷⁴ In this posture, *Fusari* can hardly be read as implying either approval or condemnation of post-termination hearings under the due process clause.

Fuentes v. Shevin,⁷⁵ which held seizure of property by writ of replevin without hearing to be unconstitutional,⁷⁶ emphasized that notice and hearing must be granted when the deprivation of property can still be prevented.⁷⁷ This would seem to apply in *Wilson*, particularly since the governmental interest at stake, one of the elements to be evaluated in determining what process is due,⁷⁸ does not appear to outweigh the needs of the person whose unemployment benefits are summarily cut off.⁷⁹

Unlike *Wilson*, several other cases decided during the survey period turned on whether the plaintiffs had a property interest protected by due process. In *State ex rel. Warzyniak v. Grenchik*,⁸⁰ the

⁶⁹See *Fusari v. Steinberg*, 419 U.S. at 388-89 n.15.

⁷⁰*Id.*

⁷¹*Id.* at 389-90.

⁷²385 N.E.2d at 445.

⁷³419 U.S. at 388 n.13 (emphasis added).

⁷⁴*Id.* at 388-89.

⁷⁵407 U.S. 67 (1972).

⁷⁶*Id.* at 81.

⁷⁷*Id.* at 81-82.

⁷⁸385 N.E.2d at 444.

⁷⁹The *Wilson* opinion makes much of the fact that under applicable Indiana procedures the full hearing on termination of benefits occurs quite speedily, thereby depriving the claimant of her benefits for only a short time prior to that hearing. 385 N.E.2d 445-46. This same fact cuts against an overwhelming government interest that the benefits be terminated summarily.

⁸⁰379 N.E.2d 997 (Ind. Ct. App. 1978). See discussion in Darko, *supra* note 51, at 295.

newly elected mayor of Whiting reorganized that city's police force and, without notice, hearing, or specification of cause, demoted many police officers to the rank of patrolman, with appropriate reductions in salary. The demoted officers sought reinstatement and damages. The court of appeals held that the officers had been deprived of due process of law.⁸¹ The applicable municipal ordinance⁸² authorized demotion only for violation of written rules and regulations, not for political reasons. Therefore, each officer had an expectation of continuation in rank unless he violated one of the rules or regulations.⁸³ The expectation constituted a property interest protected by the due process clause of the fourteenth amendment, as explained in the landmark case of *Board of Regents v. Roth*,⁸⁴ which has been impaired by demotion without notice, hearing, or cause.⁸⁵

Two fire chiefs demoted for political reasons, without notice or hearing, did not fare as well in *Morris v. City of Kokomo*.⁸⁶ They were held not to have been deprived of a property interest because the statute⁸⁷ prohibited only *removal* for political reasons.⁸⁸ Nor had there been deprivation of a protected liberty interest, concluded the court, because under *Paul v. Davis*,⁸⁹ damage to one's reputation standing alone is not sufficient but must result in termination of employment.⁹⁰ The retention of the officers in this case substantially diminished any stigma. Moreover, the defamation had not been communicated to others.⁹¹ However, the claim that the officers had been demoted because they had failed to support the mayor's re-election was held to state a claim of infringement of first amendment rights which was remanded for consideration by the trial court.⁹²

A somewhat different situation arose in *Heyne v. Mabrey*,⁹³ in which the Indiana State Personnel Board reclassified thousands of state employees, some of whom were reduced in job classification, although none received a reduction in pay. A result of the classification was that these employees no longer had available to them fur-

⁸¹379 N.E.2d at 1002.

⁸²Whiting, Ind., Ordinance 1057, 14-108, § 8 (July 2, 1962), as amended by Ordinance 1083 (Nov. 1, 1965).

⁸³379 N.E.2d at 1002.

⁸⁴408 U.S. 564 (1972).

⁸⁵379 N.E.2d at 1002.

⁸⁶381 N.E.2d 510 (Ind. Ct. App. 1978).

⁸⁷Act of April 7, 1971, Pub. L. No. 252, § 1, 1971 Ind. Acts 69 (current version at IND. CODE § 18-1-11-3 (Supp. 1979)).

⁸⁸381 N.E.2d at 513-14.

⁸⁹424 U.S. 693 (1976).

⁹⁰*Id.* at 701.

⁹¹381 N.E.2d at 515-16.

⁹²*Id.* at 516-18.

⁹³383 N.E.2d 464 (Ind. Ct. App. 1978).

ther merit or step increases within a particular job classification. The employees contended that this action constituted a demotion; that is, a deprivation of property right without due process of law. The court of appeals ruled that reclassification and demotion are not synonymous in this context and that the anticipated step increases were mere expectancies, not property rights, because they depended both on performance and recommendations.⁹⁴

A probationary police officer contended in *Gansert v. Meeks*⁹⁵ that the provisions of the Indiana Code⁹⁶ and the Allen County Police Department Merit Board Rules⁹⁷ violated his right to due process because they authorized discharge of probationary policemen without hearing or appeal. Not so, replied the court of appeals. As in the cases discussed above, to avail himself of procedural due process protections, the officer was required to demonstrate that he had protected property interest. This he was unable to do. Neither the fact that his probationary appointment was for one year nor the bare fact of his appointment created such an interest.⁹⁸

A law student who had been classified as a non-resident by university authorities was found in *Podgor v. Indiana University*⁹⁹ to have a protected property interest based on her claim of entitlement to treatment under university regulations as a resident student and, consequently, to pay lower tuition.¹⁰⁰ However, the court ruled that she had received the appropriate notice and hearing prior to the time she would have been required to pay non-resident tuition fees, and that there was substantial evidence on the record to support her classification as a non-resident.¹⁰¹

D. Exhaustion of Remedies

The Indiana Supreme Court, in *Wilson v. Review Board of Indiana Employment Security Division*,¹⁰² discussed extensively in the preceding section,¹⁰³ was faced at the outset with the fact that Wilson had failed to exhaust her administrative remedies prior to bringing the action challenging the constitutionality of the pro-

⁹⁴*Id.* at 467.

⁹⁵384 N.E.2d 1140 (Ind. Ct. App. 1979).

⁹⁶IND. CODE §§ 17-3-14-6 to -7 (1976).

⁹⁷ALLEN CTY., IND., POLICE DEPT. MERIT BD. RULES § J, ¶ 2 & § D, ¶ 7.

⁹⁸384 N.E.2d at 1143. The court also rejected the argument that the equal protection clause of the fourteenth amendment prohibited a difference in procedure for discharge of permanent police officers and probationary officers. *Id.* at 1144-45.

⁹⁹381 N.E.2d 1274 (Ind. Ct. App. 1978).

¹⁰⁰*Id.* at 1281-82.

¹⁰¹See notes 1-24 *supra*, and accompanying text.

¹⁰²385 N.E.2d 438 (Ind. 1979).

¹⁰³See text accompanying notes 51-79 *supra*.

cedures for termination of her unemployment benefits. The Indiana Employment Security Act¹⁰⁴ mandates specific procedures for determination of eligibility, and decisions of the review board are reviewable only by the court of appeals.¹⁰⁵ The court rejected the claim that Wilson's failure to exhaust was fatal.¹⁰⁶

The following factors were listed by the court for consideration in determining whether a plaintiff must exhaust administrative remedies before resort to the courts:

[T]he character of the question presented, *i.e.*, whether the question is one of law or fact; the adequacy or competence of the available administrative channels to answer the question presented; the extent or imminence of harm to the plaintiff if required to pursue administrative remedies, and; the potential disruptive effect which judicial intervention might have on the administrative process.¹⁰⁷

Because the issue in the case was of constitutional dimension, beyond the expertise of the administrative agency and more appropriate for judicial consideration, the supreme court held that the trial court erred in dismissing the complaint.¹⁰⁸ This analysis is sound and should not lead to any extensive circumvention of appropriate administrative procedures.¹⁰⁹

E. Requirement of Specific Findings

In several cases, the Indiana appellate courts admonished administrative agencies to make specific findings of fact on which to base their ultimate rulings. In *Board of Medical Registration v. Stidd*,¹¹⁰ a podiatrist's license suspension case, the board merely recited the charges in the complaint against the licensee and found him guilty as charged. In *State ex rel. Sacks Brothers Loan Co. v. DeBard*,¹¹¹ in which a license to sell handguns at retail was denied, the decision of the administrative officer recited nothing more than that the evidence disclosed the applicant not to be a proper person for license. Finally, in *Yunker v. Porter County Sheriff's Merit Board*,¹¹² a police officer dismissal case, the board's only finding was

¹⁰⁴IND. CODE §§ 22-4-1-1 to -38-3 (1976).

¹⁰⁵*Id.* § 22-4-17-12.

¹⁰⁶385 N.E.2d at 441.

¹⁰⁷*Id.*

¹⁰⁸*Id.*

¹⁰⁹See K. DAVIS, ADMINISTRATIVE LAW TEXT § 20.10 (3d. ed. 1972).

¹¹⁰377 N.E.2d 896 (Ind. Ct. App. 1978).

¹¹¹381 N.E.2d 119 (Ind. Ct. App. 1978).

¹¹²382 N.E.2d 977 (Ind. Ct. App. 1978).

a citation to the rules and regulations which the officer was found to have violated.

In each of these cases, the matter was remanded to the appropriate agency for specific findings of fact to support the administrative decision. As noted in *Yunker*, the absence of findings of the pertinent facts on which the administrative decision is based invites reweighing of the evidence on review, which the courts are not permitted to do.¹¹³

The message seems clear: specific findings of fact are required of all administrative agencies. However, in *Hawley v. South Bend Department of Redevelopment*,¹¹⁴ despite the failure of the administrative agency to find specifically the facts underlying its ultimate findings, the Indiana Supreme Court stated that because the hearing had been fully transcribed, the trial court had no problem in reviewing the agency's action. The court held, therefore, that the administrative error in not stating the underlying facts was harmless.¹¹⁵ The court's action in not remanding for specific findings seems inconsistent with its earlier statement in the same opinion that findings of fact are required "so that this Court may intelligently review that specific decision without speculating as to the Board's reasoning."¹¹⁶ In the context of the entire opinion, however, this action was proper because there appears to have been no evidence contrary to a finding of urban blight, and the opponents of the project basically attacked the admissibility of evidence, alleged procedural irregularities, and argued that the applicable statutory conditions had not been met. All arguments failed.

F. Immunity from Suit

During the survey period, the Indiana Court of Appeals decided two noteworthy cases involving immunity from suit, one dealing with sovereign immunity from liability for acts of administrative officers, and the other involving immunity of the officer himself.

In *Seymour National Bank v. State*,¹¹⁷ a state police patrol car, while in hot pursuit of a suspected felon, collided with a private automobile, the occupants of which were killed in the crash. The trial court held that the State was immune from suit under provisions of the Indiana Tort Claims Act¹¹⁸ and granted summary judg-

¹¹³*Id.* at 982.

¹¹⁴383 N.E.2d 333 (Ind. 1978).

¹¹⁵*Id.* at 336.

¹¹⁶*Id.* (quoting *Kunz v. Waterman*, 258 Ind. 573, 577, 283 N.E.2d 371, 373 (1972)).

¹¹⁷384 N.E.2d 1177 (Ind. Ct. App. 1979).

¹¹⁸IND. CODE § 34-4-16.5-3 (1976) states in pertinent part: "A governmental entity or an employee acting within the scope of his employment is not liable if a loss results from . . . (6) the performance of a discretionary function; (7) the adoption and the enforcement of or failure to adopt or enforce a law."

ment against the decedents' representative. The court of appeals reversed.¹¹⁹

Under the common law as it existed prior to the Tort Claims Act, a cause of action was stated if the plaintiff could show that the officer was acting in a ministerial capacity or owed a private duty of care to the plaintiff. Because under prior decisions drivers of speeding emergency vehicles owe a duty of care to others,¹²⁰ and an officer's duties are ministerial once he has determined to act,¹²¹ a cause of action was stated under the common law in *Seymour National Bank*. Furthermore, stated the court, the Tort Claims Act is in harmony with the common law and does not change the result.¹²² It is the decision to enforce the law which is the protected activity; the legislature did not intend the "enforcement" protected by the statute to protect negligent implementation of the decision as well. Otherwise, the result would be harsh and unjust.¹²³ The standard to be applied is whether the officer "exercised his duty with the level of care that an ordinary prudent person would exercise under the same or similar circumstances," keeping in mind the unique circumstances of police work.¹²⁴

The Indiana Supreme Court held in *Foster v. Percy*¹²⁵ that a prosecuting attorney and his deputy enjoyed an absolute immunity, not a qualified immunity, for statements made by the deputy to the press. It is the prosecutor's duty to inform the public of his activities, and he must be absolutely immune from suit in order to carry out this duty effectively. Moreover, under the Tort Claims Act,¹²⁶ the prosecutor's duty to inform the public is a discretionary action protected thereunder.¹²⁷ The supreme court specifically reserved opinion on acts outside the scope of the prosecutor's authority. For acts "reasonably within the general scope of authority granted to prosecuting attorneys," there is no liability.¹²⁸

G. Administrative Interpretation of Statutes

Cases frequently arise in which an application or interpretation of the statute under which the administrative agency operates

¹¹⁹384 N.E.2d at 1177.

¹²⁰*Bailey v. L.W. Edison Charitable Found.*, 152 Ind. App. 460, 284 N.E.2d 141 (1972).

¹²¹*Board of Comm'rs v. Briggs*, 337 N.E.2d 852 (Ind. Ct. App. 1975).

¹²²384 N.E.2d at 1186.

¹²³*Id.*

¹²⁴*Id.* at 1187.

¹²⁵387 N.E.2d 446 (Ind. 1979). For a discussion of other aspects of this case, see Ratner, *Torts, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 399, 399-421 (1980).

¹²⁶See note 118 *supra*.

¹²⁷387 N.E.2d at 449.

¹²⁸*Id.*

presents a new issue for judicial decision. In *Bender v. State ex rel. Wareham*,¹²⁹ the court of appeals reiterated the rule to be followed in such a situation:

Where, as here, the applicability of a statute is in doubt a court may look to the interpretation placed upon the statute by an administrative agency charged with its enforcement. . . . Such an administrative interpretation is not binding on this Court, but it is entitled to a great weight. . . . Furthermore, where the legislature makes no change in the statutory provision in the face of a long-standing administrative interpretation, a presumption arises that the Legislature had acquiesced in that interpretation.¹³⁰

The court applied this rule in a situation where the population of Allen County placed it within terms of conflicting statutes, one which required the appropriation of the exact amount of money needed to feed county prisoners,¹³¹ and the other which permitted the sheriff to receive a flat fee per meal served.¹³² The Indiana State Board of Accounts had long interpreted the flat fee system to apply, and although the legislature had twice amended the flat fee provision, it did not alter the population requirements,¹³³ thereby leaving Allen County within the ambit of both statutes. Under these circumstances, the flat fee system as applied by the board was held to control.¹³⁴

H. Legislation

As long as government exists, we shall have administrative agencies in one form or another and problems of administrative law to resolve. During the survey period, the Indiana Legislature enacted several statutes which deserve mention.

The Indiana Veterinary Practice Law,¹³⁵ enacted "to safeguard against the incompetent, dishonest, or unprincipled practitioner of veterinary medicine,"¹³⁶ establishes the Indiana Board of Veterinary Medical Examiners,¹³⁷ sets forth license and registration require-

¹²⁹388 N.E.2d 578 (Ind. Ct. App. 1979).

¹³⁰*Id.* at 581 (citations omitted).

¹³¹IND. CODE § 17-3-75-2 (1976).

¹³²*Id.* § 17-3-12-1.

¹³³388 N.E.2d at 582 (citing Act of Mar. 9, 1961, ch. 261, 1961 Ind. Acts 590; Act of Mar. 4, 1967, ch. 62, 1967 Ind. Acts 129).

¹³⁴388 N.E.2d at 581-82.

¹³⁵IND. CODE §§ 15-5-1.1-1 to -35 (1976 & Supp. 1979).

¹³⁶*Id.* § 15-5-1.1-1.

¹³⁷*Id.* § 15-5-1.1-3.

ments for veterinarians and veterinary technicians,¹³⁸ and provides for discipline of licensees¹³⁹ and penalties for violation of the Act.¹⁴⁰

In a sweeping revision of the criminal correction system, the legislature amended some existing statutes and enacted a new Corrections Code¹⁴¹ which, *inter alia*, creates a new department of correction within the executive branch,¹⁴² establishes a parole board within the department,¹⁴³ provides for correctional services and programs,¹⁴⁴ establishes correctional standards and procedures,¹⁴⁵ sets forth comprehensive procedures for probation and parole,¹⁴⁶ all to modernize the Indiana correction system. Although extensive analysis of the new Code is beyond the scope of this article, all practitioners and scholars who deal with matters of criminal law and procedure are urged to give their careful attention to this new statute.

In an obvious response to the refusal of the state attorney general to approve certain contracts, thereby bringing certain governmental activities to a halt,¹⁴⁷ the legislature has amended the Indiana Code to provide that failure of the attorney general to disapprove a state contract within ninety days of submission to him constitutes approval.¹⁴⁸

Finally, the Indiana Open Door (or "Sunshine") Law, which requires that meetings of government bodies be open to the public,¹⁴⁹ has been amended to allow the court, in any action filed thereunder, to "award reasonable attorney fees, court costs, and other reasonable expenses of litigation to the prevailing party if (i) the plaintiff prevails and the court finds the defendant's violation is knowing and intentional, or (ii) the defendant prevails and the court finds the action is frivolous and vexatious."¹⁵⁰

¹³⁸*Id.* §§ 15-5-1.1-9 to -21.

¹³⁹*Id.* § 15-5-1.1-22.

¹⁴⁰*Id.* § 15-5-1.1-34.

¹⁴¹*Id.* §§ 11-8-1-1 to -13-6-9 (1976 & Supp. 1979); *id.* §§ 17-3-5-7, -6.3-1; *id.* §§ 35-4-1-5-1 to -4; *id.* §§ 35-50-6-1 to -6.

¹⁴²*Id.* §§ 11-8-2-1 to -10.

¹⁴³*Id.* §§ 11-9-1-1 to -2-3.

¹⁴⁴*Id.* §§ 11-10-1-1 to -12-4.

¹⁴⁵*Id.* §§ 11-11-1-1 to -7-2.

¹⁴⁶*Id.* §§ 11-13-1-1 to -6-9.

¹⁴⁷*See* The Indianapolis Star, April 5, 1979, at 4, col. 3.

¹⁴⁸IND. CODE 4-13-2-14 (Supp. 1979). Prior to the amendment, the statute required only that all contracts and leases be approved by the attorney general.

¹⁴⁹*Id.* §§ 5-14-1.5-1 to -7 (1976 & Supp. 1979).

¹⁵⁰*Id.* § 5-14-1.5-7(c) (Supp. 1979).

III. Civil Procedure and Jurisdiction

William F. Harvey*

A. Jurisdiction, Process, Venue, and Standing

1. *Jurisdiction.*—In *Hexter v. Hexter*,¹ the Indiana Court of Appeals interpreted the United States Supreme Court decision in *Shaffer v. Heitner*.² Suit was brought to enforce three judgments rendered by an Ohio court of general jurisdiction for arrearages in child support payments and attorney fees. In the Indiana suit, the plaintiff obtained in rem authority over the defendant's property. The court of appeals sustained the jurisdiction of the Indiana trial court against motions to dismiss which had been filed in the trial court under Trial Rule 12(B)³ and Trial Rule 4.4(A),⁴ denied, and raised on appeal. The defendant argued that under *Shaffer* the exercise of

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¹386 N.E.2d 1006 (Ind. Ct. App. 1979). For discussion of another aspect of this case, see text accompanying notes 64-66 *infra*.

²433 U.S. 186 (1977), discussed in Harvey, *Civil Procedure and Jurisdiction, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 51, 51-52 (1978) [hereinafter cited as Harvey, 1977 Survey].

³IND. R. TR. P. 12(B) provides in part:

Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto if one is required; except that at the option of the pleader, the following defenses may be made by motion:

(1) Lack of jurisdiction over the subject-matter,
(2) Lack of jurisdiction over the person,

. . . .

(6) Failure to state a claim upon which relief can be granted which shall include failure to name the real party in interest under Rule 17.

⁴IND. R. TR. P. 4.4 (A) sets out seven separate bases for the assertion of jurisdiction over a person or organization that is a nonresident of the state, or a resident of the state who has left the state, or a person whose residence is unknown, as to any action arising from the listed acts which were committed by that person or organization, or his agent. Among those listed acts are: "(1) doing any business in this state; (2) causing personal injury or property damage by an act or omission done within this state; . . . (5) owning, using, or possessing any real property or an interest in real property within this state"

In addition, IND. R. TR. P. 64(B)(2) provides for the attachment and garnishment, at the onset of an action, of any interest in tangible or intangible property owned by the defendant, if it is subject to execution, proceedings supplemental to execution, or any creditor process allowed by law, except wages or salaries.

The defendant's motion to dismiss maintained, of course, that the action against him did not fall among the jurisdictional bases under Indiana law.

in rem jurisdiction over this property was improper because he had had no contact with the State of Indiana which would support in personam jurisdiction.

The appellate court held that while the argument "might have had merit [if the Indiana trial court were] adjudicating some underlying controversy between the parties, it is of no moment where, as here, the suit is one to enforce an existing judgment."⁵ The court observed that this precise situation had been addressed in *Shaffer* by Justice Marshall⁶ who noted that there "would seem to be no unfairness in allowing an action to realize on [a judgment debt from the debtor to the plaintiff] in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter."⁷

Another United States Supreme Court case, *Kulko v. Superior Court*,⁸ addressed the in personam jurisdiction requirements enunciated in *Shaffer*. In *Kulko*, a husband and wife had established their marital domicile in New York, but the wife had obtained a divorce in Haiti which included a separation agreement giving each parent certain rights of visitation concerning the children. The wife brought suit in California to establish the divorce and to modify the custody agreement and increase the child support obligations of the father. The father had no earlier relationship to California other than sending one of the children there to live with the mother.

The Supreme Court held that California could not assert jurisdiction over the father because the appellant had derived "no personal or commercial benefit from his child's presence in California."⁹ The court held further that California could not find as a basis for personal jurisdiction under the "minimum contacts" rule that the father had allowed one of the children to spend more time with the mother than was required by the separation agreement.¹⁰

The *Kulko* holding, among others, was reviewed in *Oddi v. Mariner-Denver, Inc.*¹¹ In *Oddi*, the plaintiff sued for injuries, claiming that she had been bitten by bed bugs while staying in the defendant's hotel in Denver, Colorado. Suit was brought in Indiana against Holiday Inn of America and the Holiday Inn (Mariner-Denver) in Denver.

The federal district court held, on a motion to dismiss, that jurisdiction was not available under any of the provisions of Trial

⁵386 N.E.2d at 1007.

⁶*Id.*

⁷433 U.S. at 210-11 n.36.

⁸436 U.S. 84 (1978).

⁹ *Id.* at 100.

¹⁰*Id.* at 94.

¹¹461 F. Supp. 306 (S.D. Ind. 1978).

Rule 4.4.¹² The court had no jurisdiction under Trial Rule 4.4(A)(3),¹³ because the out-of-state harm did not cause a tortious injury in the State of Indiana, or under Trial Rule 4.4(A)(1), because the defendant was not doing any business in this state.¹⁴ Citing both *Shaffer* and *Kulko*, the court concluded that Mariner-Denver's contacts with Indiana did not form the basis for the cause of action, and that there were, at best, only the barest minimal contacts with Indiana.¹⁵

The court also held that there was no jurisdiction over Holiday Inn of America, a Tennessee corporation with its principal place of business in Tennessee:

The mere fact that it may have subsidiaries, franchisees or licensees in this state does not subject it to the jurisdiction of this state. The general rule is that a foreign parent corporation will not be subjected to a state's jurisdiction merely because of its ownership of a subsidiary corporation doing business within the state.¹⁶

The pleading of subject matter jurisdiction was also discussed during the survey period in *Campbell v. Campbell*,¹⁷ wherein the Indiana court held that in a suit brought under a special statutory proceeding, the plaintiff must plead sufficient jurisdictional facts and set out the statutory provision under which the plaintiff is proceeding.¹⁸

2. *Standing ("Ripeness") in the Form of Access to Courts when Subject Matter and Personal Jurisdiction is Established or Alleged.*— In *Hines v. Elkhart General Hospital*,¹⁹ the plaintiff challenged the constitutionality of the Indiana Medical Malpractice Act of 1975,²⁰ claiming, *inter alia*, that the statute violated article 1, section 12 of the Indiana Constitution, which guarantees the right of access to the

¹²*Id.* at 308-10.

¹³IND. R. TR. P. 4.4(A)(3) provides for jurisdiction over nonresidents causing personal injury or property damage in this state by an occurrence, act, or omission done outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue or benefit from goods, materials, or services used, consumed, or rendered in this state

¹⁴See note 4 *supra*.

¹⁵461 F. Supp. at 308-09.

¹⁶*Id.* at 310.

¹⁷388 N.E.2d 607 (Ind. Ct. App. 1979) (child custody dispute). See notes 75-79 *infra* and accompanying text.

¹⁸*Id.* at 609 n.3. Compare this requirement with the required plea of jurisdiction in FED. R. CIV. P. 8(a).

¹⁹465 F. Supp. 421 (N.D. Ind. 1979). For a discussion of another aspect of this case, see text accompanying notes 159-62 *infra*.

²⁰IND. CODE §§ 16-9.5-1-1 to -10-5 (1976 & Supp. 1979).

courts of Indiana and remedy for injury to person, property, or reputation. The plaintiff claimed that the "costs and delays resulting from the medical review panel procedure established by the Act, and the Act's limitation upon damages recoverable against health care providers for medical malpractice clearly violate [the constitutional] proscriptions."²¹ The federal district court rejected this claim, stating that the claimant's right to pursue his claim is not a fundamental right, and that the administrative remedy required in medical malpractice statutes and the added expenses that result do not constitute a violation of due process.²²

The Indiana Supreme Court held, in *Wilson v. Review Board of Indiana Employment Security Division*,²³ that under certain circumstances a trial court could entertain an action even though the plaintiff had failed to exhaust her administrative remedies.²⁴ The plaintiff challenged the procedures employed by the defendant on constitutional grounds, contending that under the Indiana Employment Security Act,²⁵ the court of appeals has the exclusive right to review decisions by the board, and that the trial court was without jurisdiction in this case.²⁶

The court observed that the rule requiring exhaustion of administrative remedies "should not be applied mechanistically."²⁷ Instead, the court should consider the following pertinent factors: "[T]he character of the question presented, i.e., whether the question is one of law or fact; the adequacy or competence of the available administrative channels to answer the question presented; the extent or imminence of harm to the plaintiff if required to pursue administrative remedies, and; the potential disruptive effect which judicial intervention might have on the administrative process."²⁸

The supreme court concluded that in the present case the question presented was of a "constitutional character, [involving] a purely legal issue . . . beyond the expertise of the Division's administrative channels and . . . thus a subject more appropriate for judicial consideration."²⁹

3. *Standing in the Form of Determining Whether a Party Can Invoke the Court's Jurisdiction.*—In *Board of Trustees v. City of*

²¹465 F. Supp. at 431-32.

²²*Id.* at 433. The court also observed that if suit is filed and the case goes to trial, "the judge or jury remain the final arbiter of factual questions concerning the liability and quantum." *Id.* (quoting *Everett v. Goldman*, 359 So. 2d. 1256, 1269 (La. 1978)).

²³385 N.E.2d 438 (Ind. 1979).

²⁴*Id.* at 441.

²⁵IND. CODE §§ 22-4-1-1 to -8-3 (1976 & Supp. 1979).

²⁶*See id.* § 22-4-32-13 (1976).

²⁷385 N.E.2d at 441.

²⁸*Id.*

²⁹*Id.*

Fort Wayne,³⁰ the Indiana Supreme Court held that, because standing determines whether the complaining party is a proper party to invoke a trial court's jurisdiction, lack of standing is a restraint upon the court's exercise of jurisdiction. If there is no demonstrable injury to the complaining party or person, the trial court cannot proceed.³¹ Thus, standing is used here to define a jurisdictional element of a case or controversy, without which the court has no authority or power to render a decision on a dispute before it.³²

A similar case³³ developed when the Indiana Medical Licensing Board adopted certain resolutions which defined the practice of chiropractic in such a way that chiropractic analysis did not include the performance and interpretation of cardiograms, blood tests, urinalysis, or other analyses.³⁴ The Indiana State Chiropractic Association and the Indiana Society of Chiropractic Physicians filed suit for declaratory and injunctive relief, alleging that the proposed rules would emasculate the practice of chiropractic in Indiana.

The court of appeals held that in the absence of a showing of injury to the associations, they did not have standing to bring the action.³⁵ Because the individual chiropractors, and not the associations, would be subject to malpractice claims, there was no showing of infringement of the associations' legal interest.³⁶ Citing *City of Indianapolis v. Indiana State Board of Tax Commissioners*,³⁷ which held that the absence of standing was a restraint upon the trial court's *jurisdiction*, the court concluded that the trial court could not proceed.³⁸

4. *Service of Process*.—In *Green v. Carlson*,³⁹ the plaintiff was the administratrix of the estate of a deceased prisoner who had been in a federal prison in Terre Haute, Indiana. Suit was brought against certain prison administration officials and other employees, alleging, generally, that the defendants were responsible for the death of the deceased. Process was effected upon the Assistant Surgeon General of the United States, Mr. Brutshe, and upon the

³⁰375 N.E.2d 1112 (Ind. 1978).

³¹*Id.* at 1117.

³²*Id.* The case was remanded to the trial court for a determination of the issue of standing of the City of Fort Wayne. This litigation, brought to decide questions of annexation of territory in Allen County, has proceeded for 27 years. *Id.* at 1114.

³³*Medical Licensing Bd. v. Indiana State Chiropractic Ass'n*, 373 N.E.2d 1114 (Ind. Ct. App. 1978).

³⁴*Id.* at 1114-15.

³⁵*Id.* at 1116.

³⁶*Id.*

³⁷261 Ind. 635, 308 N.E.2d 868 (1974).

³⁸373 N.E.2d at 1116.

³⁹581 F.2d 669 (7th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3813 (U.S. June 18, 1979) (No. 78-1261).

Director of the Federal Bureau of Prisons, Mr. Carlson, by certified mail pursuant to Federal Rule of Civil Procedure 4(e),⁴⁰ which allows the use of Indiana's service of process rules, and Indiana's bases of jurisdiction under Trial Rule 4.4.⁴¹ The district court dismissed the nonresident defendants, and the federal court of appeals reversed, holding that "Indiana Trial Rule 4.4 . . . provides for service by certified mail. Both defendants had contacts with Indiana sufficient to permit use of this provision and to meet the requirements of due process."⁴²

The court's reasoning in *Green* on the jurisdictional and process questions was very general. Apparently the court considered that the out-of-state defendants, the named federal officials, had control over the federal prison at Terre Haute, Indiana, or that the officials there were subject to their control. Thus, the allegations made by the plaintiff's administratrix would bring those federal officials under Trial Rule 4.4(A)(2), or perhaps (A)(3). If that is so, then Trial Rule 4.4 does allow service of process as provided elsewhere in Trial Rule 4. Trial Rule 4.1(A)(1), which provides for certified mail, was apparently used in this case.⁴³

In *Grecco v. Campbell*,⁴⁴ the defendant attempted to obtain relief from a default judgment entered because he did not respond to service of process which was served on him at his "place of abode." The court held that service was proper and that the definition of "a party's 'dwelling house' or usual place of abode within the context of [Trial

⁴⁰FED. R. CIV. P. 4(e) provides in part that "whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons . . . upon a party not . . . found within the state," the federal district court may effect service according to that state statute or rule of court.

⁴¹IND. R. TR. P. 4.4(B) provides in part: "A person subject to the jurisdiction of the courts of this state under this rule may be served with summons: (1) as provided by Rules 4.1 (service on individuals)"

⁴²581 F.2d at 676.

⁴³IND. R. TR. P. 4.1(A) provides:

Service may be made upon an individual, or an individual acting in a representative capacity, by

(1) sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgement of receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter; or

(2) delivering a copy of the summons and complaint to him personally; or

(3) leaving a copy of the summons and complaint at his dwelling house or usual place of abode with some person of suitable age and discretion residing therein; or

(4) serving his agent as provided by rule, statute or valid agreement.

⁴⁴386 N.E.2d 960 (Ind. Ct. App. 1979).

Rule] 4.1 is a question that must turn on the particular facts of each case.”⁴⁵

The significance of service and failure to appear is great, not only because a default judgment may be entered, but also because the three-day notice rule under Trial Rule 55(B),⁴⁶ to which a party is entitled who is to be defaulted, is not applicable when the defaulted party has not made an appearance.⁴⁷ Additionally, insufficient or defective service of process is remedied when a party makes an entry of appearance to defend the action,⁴⁸ and a defendant who enters the court and seeks some form of relief or disposition from the trial court, such as a change of venue, has voluntarily submitted to the trial court’s jurisdiction, and the absence of personal jurisdiction is waived.⁴⁹

An unusual interpretation of the service of process provisions appeared in *Eicher v. Walter A. Doerflein Insurance Agency*.⁵⁰ Service was attempted by certified mail with return receipt requested pursuant to Small Claims Rule 3.⁵¹ The notice of the claim was returned by the United States Postal Service bearing the notation “unclaimed.” The plaintiff attempted no other method of service. It would appear here that “unclaimed” meant that the notice of claim was refused by the defendants. The court of appeals held that this process did not “establish a reasonable probability that defendant received such notice.”⁵² As a result, a default judgment which had been entered against the defendants was ordered vacated.

⁴⁵*Id.* at 962.

⁴⁶IND. R. TR. P. 55(B) provides in part: “If the party against whom judgment by default is sought has appeared in the action, he . . . shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application.”

⁴⁷386 N.E.2d at 962.

⁴⁸*Hexter v. Hexter*, 386 N.E.2d 1006, 1009 (Ind. Ct. App. 1979).

⁴⁹*Killearn Properties, Inc. v. Lambright*, 377 N.E.2d 417, 419 (Ind. Ct. App. 1978). For a discussion of the court’s holding on sufficient minimum contacts for establishing personal jurisdiction, see *In re Marriage of Rinderknecht*, 367 N.E.2d 1128, 1136 n.11 (Ind. Ct. App. 1977); Harvey, 1977 *Survey*, *supra* note 2, at 52 n.5. *Rinderknecht* contains an excellent discussion of the law on raising the issue of lack of personal jurisdiction. If the claim is not raised at the first opportunity, that is, one’s first pleading or motion, it is lost or waived. It is important that the question be properly raised in the trial court, in order that the jurisdictional question will be preserved on appeal.

⁵⁰384 N.E.2d 1126 (Ind. Ct. App. 1979).

⁵¹IND. R. SM. CL. 3 provides in part: “For the purpose of service the notice of claim shall also be considered to be the summons. A copy of the notice of claim shall be served upon each defendant by registered or certified mail with return receipt requested.”

⁵²384 N.E.2d at 1126 (quoting IND. R. SM. CL. 10(B)). IND. R. SM. CL. 10(B) provides in part:

Before default judgment is entered, the court shall examine the notice of claim and return thereof and make inquiry, under oath, of those present so

It is suggested that if the return was refused by the defendants, service of process was more than adequate, and the default judgment should have been sustained. The opinion should be limited to the specific facts of the case and should not be used as precedent elsewhere.

In a major case, the Supreme Court in *Memphis Light, Gas & Water Division v. Craft*⁵³ held that the due process clause⁵⁴ is applicable to a termination of service by a municipal utility.⁵⁵ The plaintiffs had received notification of the termination of utility services to their newly purchased home because of nonpayment of monthly bills. The plaintiffs had been receiving "double billing" due to an error on the part of the utility.

The Supreme Court considered the adequacy of notice and the adequacy of a hearing before an identifiable property right or interest can be disturbed by a municipal utility. The Court held that although the notification procedure which the utility used was adequate to inform the plaintiffs of the threat of termination of service, it was not reasonably calculated to inform them of the availability of an opportunity to present their objections to their bills or an opportunity for a hearing of the question. Accordingly, notice in this case did not comply with constitutional requirements.⁵⁶

It now seems clear that if an administrative remedy or proceeding is available to the user of a municipal utility, notification of that remedy is constitutionally required, along with the usual notification of termination of the utility's service. The property interest of the user cannot be disturbed without that type of "extra" notification.⁵⁷

5. *Forum Non Conveniens and Comity*.—In *Killearn Properties, Inc. v. Lambright*,⁵⁸ a suit arose from an alleged conspiracy to sell Florida real estate in violation of both state and federal law. Suit was brought in Indiana. The defendants' motion to have the

as to assure the court that:

(a) Service of notice of claim was had under such circumstances as to establish a reasonable probability that the defendant received such notice.

⁵³436 U.S. 1 (1978).

⁵⁴U.S. CONST. amend. XIV, § 1.

⁵⁵436 U.S. at 22.

⁵⁶*Id.* at 14-15.

⁵⁷The Court said: "Many of the Court's decisions in this area have required additional procedures to further due process, notwithstanding the apparent availability of [other forms of relief]." *Id.* at 20 n.26 (citing *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Goss v. Lopez*, 419 U.S. 565 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969)).

⁵⁸377 N.E.2d 417 (Ind. Ct. App. 1978).

case transferred to Florida pursuant to Trial Rule 4.4(C)⁵⁹ was denied by the trial court.⁶⁰

The defendants argued that Florida was the more convenient forum because the land was located there, the contract of sale was executed there, and all of the defendants were either residents of Florida, or corporations whose principal place of business was in Florida. The Indiana appellate court sustained the trial court's ruling.⁶¹ Because several defendants who were not parties to the appeal, along with the plaintiffs and several prospective witnesses, were residents of Indiana, there was no abuse of the trial court's discretion in refusing to transfer the case to a Florida court.⁶² The court of appeals stated that the review standard under Trial Rule 4.4(C) was whether the trial court had abused its discretion in ruling on a motion made pursuant to that provision.⁶³

The provisions of Trial Rule 4.4(C) were also explored in *Hexter v. Hexter*.⁶⁴ The appellant argued that, because the same action had been brought in Virginia in 1975, the principle of "comity" should require dismissal of the action by the Indiana court. The court rejected this argument on the ground that comity was not a mandatory law, but a rule "of practice, convenience, and courtesy."⁶⁵ Because the Virginia suit had not proceeded further since 1975, there was little danger that the defendant would be subjected to inconsistent judgments.⁶⁶

6. *Change of Venue*.—It is a general rule that a timely motion for change of venue divests the court of jurisdiction to take any action except to grant the motion.⁶⁷ The policies of Trial Rule 76 are

⁵⁹IND. R. TR. P. 4.4(C) provides:

Jurisdiction under this rule is subject to the power of the court to order the litigation to be held elsewhere under such reasonable conditions as the court in its discretion may determine to be just.

In the exercise of that discretion the court may appropriately consider such factors as:

....

(2) Convenience to the parties and witnesses of the trial in this state in any alternative forum;

(3) Differences in conflict of law rules applicable in this state and in the alternative forum; or

(4) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.

⁶⁰377 N.E.2d at 418.

⁶¹*Id.*

⁶²*Id.* at 419.

⁶³*Id.*

⁶⁴386 N.E.2d 1006 (Ind. Ct. App. 1979). For discussion of another aspect of this case, see text accompanying notes 1-7 *supra*.

⁶⁵*Id.* at 1008.

⁶⁶*Id.*

⁶⁷*City of Fort Wayne v. State ex rel. Hoagland*, 342 N.E.2d 865 (Ind. Ct. App. 1976).

"to guarantee a fair and impartial trial by making the automatic change of venue available, . . . [and] to avoid protracted litigation by imposing a time limit after which a change of venue motion shall be denied."⁶⁸ Trial Rule 76(3) provides that "in those cases where no pleading or answer may be required to be filed by the defending party to close issues . . . each party shall have thirty (30) days after the filing of such case within which to request a change from the judge or the county."⁶⁹

*In re Marriage of Brown*⁷⁰ was a case involving an action for the dissolution of a marriage. The petition was filed on May 25, 1977, and the counter-petition and answer on June 3, 1977. A motion for change of venue from the county was filed on June 14, 1977. The trial court denied the motion because it was filed later than ten days after the close of issues, and the case proceeded to trial.

On appeal the court held that denial of the motion was error because the thirty-day time limit for a request for change of venue under Trial Rule 76(3) applies to every case in which no pleading or answer is required to be filed, even if the defending party actually files a pleading or answer.⁷¹ In this case, the defendant filed an answer, although none is required for the dissolution of a marriage.⁷²

If the suit is a proceeding supplemental, however, or in the nature of a proceeding supplemental, then no change of venue is allowed. The supreme court so held in a case⁷³ interpreting the Uniform Reciprocal Enforcement of Support Act of 1961.⁷⁴ The court reasoned that the enforcement of a foreign support decree, in which the parties were the same as in the original proceeding, was in the nature of a continuing proceeding. Although it was necessary for the judgment or foreign order to first be confirmed in Indiana, the nature of the suit, enforcement of a prior support order, remained the same. Thus no change of venue was permitted.⁷⁵

B. Pleadings and Pre-Trial Motions

1. *Pleadings to Conform to the Evidence Under Trial Rule 15(B).*—Trial Rule 7(A)⁷⁶ requires, of course, an answer to a com-

⁶⁸State *ex rel.* Yockey v. Superior Court, 261 Ind. 504, 506, 307 N.E.2d 70, 71-72 (1974), discussed in Harvey, *Civil Procedure & Jurisdiction, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 88, 98 (1976).

⁶⁹IND. R. TR. P. 76(3).

⁷⁰387 N.E.2d 72 (Ind. Ct. App. 1979). The pleadings aspect of this case is discussed in text accompanying notes 82-84 *infra*.

⁷¹*Id.* at 73-74.

⁷²IND. CODE § 31-1-11.5-4(c) (1976).

⁷³State *ex rel.* Greebel v. Endsley, 379 N.E.2d 440. (Ind. 1978).

⁷⁴IND. CODE §§ 31-2-1-1 to -39 (1976) (amended 1979).

⁷⁵379 N.E.2d at 441.

⁷⁶IND. R. TR. P. 7(A) provides in part that "[t]he pleadings shall consist of (1) a complaint and an answer . . ." See also IND. R. TR. P. 8(B), 8(D).

plaint. Some cases arise, however, in which none is required.

In *In re Estate of Swank*,⁷⁷ the trial court's dismissal of a petition for the removal of a representative and the appointment of a special administrator was sustained on appeal.⁷⁸ The appellant argued that the trial court should not have considered the motion to dismiss because it was filed pursuant to Trial Rule 12(B)(6) after the twenty-day time limit imposed by Trial Rule 6(C).⁷⁹ The appellate court held that a responsive pleading to the petition for removal was not required because the controlling statute and provisions for removal do not demand adherence to the formal rules of pleading.⁸⁰ The petition was regarded as merely ancillary to the probate of a will, and thus neither Trial Rule 7 nor Trial Rule 6(C) controlled the question of the time when a motion to dismiss could have been considered.⁸¹

A similar observation was made in *In re Marriage of Brown*,⁸² a suit for the dissolution of marriage. The court pointed out that the statute⁸³ required no responsive pleading.⁸⁴ Such a statute is a qualification, obviously, of Trial Rule 7(A).

An important qualification of Trial Rule 8(A)⁸⁵ is found in *Campbell v. Campbell*,⁸⁶ although the case does not actually discuss the rule. *Campbell* was a statutory proceeding under the Uniform Child Custody Jurisdiction Act⁸⁷ for a change of child custody. There was no allegation in the complaint concerning the jurisdiction of the trial court. Generally, no such allegation is required in a state court when the court is one of general jurisdiction. In this case, however, the court held that a plea of jurisdiction was required:

⁷⁷375 N.E.2d 238 (Ind. Ct. App. 1978).

⁷⁸*Id.* at 241.

⁷⁹IND. R. TR. P. 6(C) determines the time for filing a responsive pleading when one is required and the time for filing a responsive pleading if a motion under Trial Rule 12(B) has been filed. But Trial Rule 6(C) *does not control* the time when a Trial Rule 12(B) motion must be filed; it speaks to the effect of filing such a motion on a responsive pleading, or the effect such a motion has after the trial court has ruled on it. Thus, the attorney's argument in this case was considerably wide of the mark, but it shows the confusion which may be present in the bench and bar. *DeHart v. Anderson*, 383 N.E.2d 431 (Ind. Ct. App. 1978), makes this very important distinction. See note 104 *infra* and accompanying text.

⁸⁰375 N.E.2d at 240.

⁸¹*Id.* See generally IND. R. TR. P. 1.

⁸²387 N.E.2d 72 (Ind. Ct. App. 1979).

⁸³IND. CODE § 31-1-11.5-4(c) (1976).

⁸⁴387 N.E.2d at 73. A responsive pleading was in fact filed.

⁸⁵IND. R. TR. P. 8(A) states in part that "a pleading must contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief . . ." There is no provision for the allegation of jurisdiction under Trial Rule 8(A).

⁸⁶388 N.E.2d 607 (Ind. Ct. App. 1979).

⁸⁷IND. CODE §§ 31-1-11.6-1 to -24 (Supp. 1979).

While it is generally not necessary to plead jurisdictional facts, such averments must be made in a special statutory proceeding. Such averments go to the subject matter jurisdiction of the court. In this respect, the Act is analogous because subject matter jurisdiction cannot be established without the ascertainment of jurisdictional facts.⁸⁸

The court also held that a clause in the complaint factually showing the jurisdiction of the court under the Act must be pleaded and proved when jurisdiction is denied.⁸⁹

Under *Campbell*, a plea to establish the subject matter jurisdiction must be set out, and the parties do not establish the prerequisite jurisdiction by a failure to raise the issue, even if such failure is by positive consent. In short, parties cannot create subject matter jurisdiction by their consent.

An affirmative defense will be waived if not asserted, even if the affirmative defense is not listed among those defenses set out in Trial Rule 8(C).⁹⁰ Thus, in *United Farm Bureau Mutual Insurance Co. v. Wolfe*,⁹¹ the insurance company failed to raise the affirmative defense of performance of a condition precedent in its responsive pleading, and the court held that under Trial Rules 8(C) and 9(C)⁹² the defense was waived.⁹³

⁸⁸388 N.E.2d at 609 n.3 (citations omitted).

⁸⁹*Id.* at 608-10.

⁹⁰IND. R. TR. P. 8(C) lists the following affirmative defenses:

Accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, lack of jurisdiction over the subject-matter, lack of jurisdiction over the person, improper venue, insufficiency of process or service of process, the same action pending in another state court of this state, and any other matter constituting an avoidance, matter of abatement, or affirmative defense.

⁹¹382 N.E.2d 1018 (Ind. Ct. App. 1978).

⁹²IND. R. TR. P. 9(C) states:

In pleading the performance or occurrence of promissory or non-promissory conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed, have occurred, or have been excused. A denial of performance or occurrence shall be made specifically and with particularity, and a denial of excuse generally.

⁹³382 N.E.2d at 1020. The defense in question was lack of written consent to bring an uninsured motorist's suit, a condition precedent to the suit.

In *Delaware County v. Powell*, 382 N.E.2d 958 (Ind. Ct. App. 1978), the plaintiff sued the county in a complaint filed very near the expiration of the statute of limitations, and did not give the county notice within 180 days of the loss or injury, as required by the applicable statute, IND. CODE §§ 34-4-16.5-7 to -12 (1976). The plaintiff was injured by a county highway truck. After the injury the county paid for the plaintiff's medical expenses and loss of wages. The question whether the county was estopped from asserting lack of notice was thus factually raised. The court of appeals held that

If an affirmative defense is properly in evidence before the court, even though not affirmatively pleaded, and the party opposing the defense fails to object to the evidence which supports it, the defense is not waived. In *Homemakers Finance Service, Inc. v. Ellsworth*,⁹⁴ the affirmative defense of accord and satisfaction was raised in that way, and the court in accordance with Trial Rule 15(B)⁹⁵ allowed the question to be litigated.⁹⁶

A similar case is *Puckett v. McKinney*,⁹⁷ a suit for defamation and interference with a contractual expectancy brought by a school teacher against the principal of the school. The defendant school principal did not plead the defense under Trial Rule 8(C) of a qualified privilege to make certain statements. The court of appeals held that the defense had been raised in the case by evidence not objected to by the plaintiff.⁹⁸ Thus, under Trial Rule 15(B), the issue was tried by the implied consent of the parties and treated as if it had been raised by the pleadings.⁹⁹

the notice provision in the tort claim statute was a procedural precedent which could be tolled by incompetency or waived under Trial Rule 8(C) by the defendant's failure to assert the plaintiff's noncompliance in the responsive pleading. *Id.* at 962. The court held that the notice provision is different from other affirmative defenses under Trial Rule 8(C), and that once the issue of notice has been raised by the defendant the plaintiff must show either actual or substantial compliance with the notice provision, or the action is barred. *Id.* The court observed that the notice provision is akin to a true statutory condition precedent: once it is properly placed in issue, it is not subject to either estoppel or waiver as a result of any prior action by the defendant or the defendant's agent. *Id.* The court affirmed a summary judgment against the plaintiff, holding that neither knowledge of the occurrence nor investigation of the accident by the defendant is sufficient to meet the purposes of the statute and that timely written notice to the county is imperative. *Id.* See Harvey, 1977 Survey, *supra* note 2, at 54-55.

⁹⁴380 N.E.2d 1285 (Ind. Ct. App. 1978).

⁹⁵IND. R. TR. P. 15(B) states that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated . . . as if they had been raised in the pleadings." Accordingly, the pleadings may be amended upon a motion made at any time to show that the issues were tried.

⁹⁶380 N.E.2d at 1288.

⁹⁷373 N.E.2d 909 (Ind. Ct. App. 1978).

⁹⁸*Id.* at 911.

⁹⁹See *State v. Gradison*, 381 N.E.2d 1259 (Ind. Ct. App. 1978), a condemnation action for highway construction in which a deed conveying a certain parcel to the landowner was admitted *without objection from the state*. The court of appeals held that admission of the evidence created an issue in the litigation, and that the trial court may properly amend the pleadings under Trial Rule 15(B) to conform to the evidence in the case. *Id.* at 1263. The nature of the request to amend a pleading under Trial Rule 15(B) is discussed in *2625 Bldg. Corp. v. Deutsch*, 385 N.E.2d 1189, 1194 (Ind. Ct. App. 1979), in which the plaintiff's counsel in his opening statement indicated that he was proceeding on two theories of recovery, and at the close of the evidence informed the court that he was proceeding on only one theory. The court of appeals held that the plaintiff had, in effect, requested the trial court to amend the pleading to conform to the evidence. *Id.*

2. *Amended Pleadings and Failure to Respond.*—Trial Rule 8(D) provides that “[a]verments in a pleading to which a responsive pleading is required, except those pertaining to amount of damages, are admitted when not denied”¹⁰⁰ The question then arises, may the pleading be amended under Trial Rule 15(A)?¹⁰¹ If there is no opportunity to amend as of right under the first sentence of Trial Rule 15(A), an amendment may be made only at the discretion of the trial court. The court in *B & D Corp. v. Anderson, Clayton & Co.*,¹⁰² a major class action, held that exercise of the trial court’s sound discretion would be reviewed on appeal only for an abuse of that discretion, and that this privilege allowed the trial judge to decide, within the confines of justice, what was equitable.¹⁰³

If that discretion is exercised, and a pleading is amended under Trial Rule 15(A), then certain rules concerning the time for filing pre-pleading motions are affected. In *DeHart v. Anderson*,¹⁰⁴ the court apparently held that an amended pleading under Trial Rule 15(A) will replace the original pleading for all purposes, and that when permission is given to amend a pleading, it will effect an extension of time for answers to the pleading, including preliminary motions.¹⁰⁵ Accordingly, the time for making a motion under Trial Rule 12(B) is governed by Trial Rule 12(B), and not Trial Rule 6(C), which speaks to the effect of a motion under Trial Rule 12(B) once it is made.¹⁰⁶ Thus, when the trial court allowed the defendant to file an amended answer, and thereby granted an extension of time in which to answer, the effect was to extend the time for preliminary motions as well. The complaint was filed on July 29, 1975, for recovery for personal injuries. The trial court allowed an amended answer to be filed on November 20, 1975. On the same date the defendant also filed a motion to dismiss, which raised the statute of limitations. The motion was timely filed because it was filed with the amended complaint.¹⁰⁷

¹⁰⁰*Construed in Inter-City Contractors Serv., Inc. v. Consumer Bldg. Indus., Inc.*, 373 N.E.2d 903 (Ind. Ct. App. 1978).

¹⁰¹IND. R. TR. P. 15(A) provides in part:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, and the action has not been placed upon the trial calendar, he may so amend it at any time within thirty (30) days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party

¹⁰²387 N.E.2d 476 (Ind. Ct. App. 1979).

¹⁰³*Id.* at 482.

¹⁰⁴383 N.E.2d 431 (Ind. Ct. App. 1978).

¹⁰⁵*Id.* at 436.

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 436-37.

3. *Pre-Trial Motions.*—A motion to dismiss under Trial Rule 12(B)(6) attacks the adequacy of the complaint by stating that it fails to allege a claim for relief. Such a motion must meet the test in *State v. Rankin*.¹⁰⁸ A complaint is not subject to dismissal “unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts.”¹⁰⁹

In 1970 a blight epidemic infested the 1970 corn crop yielded from T hybrid seed corn and reduced the crop nationwide by no less than 500 million bushels. That epidemic became the subject of an Indiana class action in *B & D Corp. v. Anderson, Clayton & Co.*,¹¹⁰ which came before the court of appeals after the trial court granted a motion to dismiss an amended complaint, apparently on the ground that the complaint did not adequately allege that the defendants were jointly and severally liable to the plaintiffs for damages arising from the same occurrence or series of occurrences.

The court of appeals treated the question as one in which “at the very least a description of the tortious conduct forming the basis of the plaintiff’s claim” must be alleged.¹¹¹ The court found that “the amended pleading in the present case reveals no fact allegations describing any such joint action as complained of by Corn Farmers [plaintiffs] in the second amended complaint.”¹¹²

It is suggested that the appellate court was in error in the decision. It applied a test to determine the adequacy of a complaint which was expressly rejected by the Indiana Supreme Court in *Rankin*.

In *Rankin* the supreme court stated: “We might note that certain cases from the Court of Appeals apparently state that the plaintiff is required to state in his complaint the theory upon which his claim is based. Although a statement of the theory may be highly desirable, it is not required.”¹¹³ The court in *B & D Corp.* quoted from the *Rankin* opinion but omitted the first sentence quoted above which gave meaning to the *Rankin* test.¹¹⁴ The *Rankin* court expressly rejected *Cheatham v. City of Evansville*,¹¹⁵ which embraced the theory-of-relief-in-the-complaint test instead of the standard that a complaint is inadequate only if it appears that the plaintiff would not been entitled to relief under any set of facts.

¹⁰⁸260 Ind. 228, 294 N.E.2d 604 (1973).

¹⁰⁹*Id.* at 230-31, 294 N.E.2d at 606.

¹¹⁰387 N.E.2d 476 (Ind. Ct. App. 1979).

¹¹¹*Id.* at 481 (quoting *Kiyose v. Trustees of Indiana Univ.*, 116 Ind. App. 34, 44-45, 333 N.E.2d 886, 891 (1975)).

¹¹²387 N.E.2d at 481.

¹¹³260 Ind. at 231, 294 N.E.2d at 606 (citations omitted).

¹¹⁴387 N.E.2d at 481.

¹¹⁵151 Ind. App. 181, 278 N.E.2d 602 (1972).

The facts in the *B & D Corp.* complaint were extensively pleaded in any event; it is suggested that this opinion attempts a revival of the test for determining the adequacy of a complaint which the Indiana Supreme Court has specifically rejected.¹¹⁶

If a motion to dismiss is granted under Trial Rule 12(B)(1), the dismissal will be a final and appealable order because the trial court has held that there is no subject matter jurisdiction.¹¹⁷ A motion for summary judgment in a pre-trial motion resting solely on the movant's answer with no further information provided shall be treated as one for judgment on the pleadings under Trial Rule 12(C).¹¹⁸

C. Parties and Discovery

1. *Joinder of Parties.*—In *Gumz v. Starke County Farm Bureau Cooperative*,¹¹⁹ the plaintiff grain elevator operators brought suit against four persons who farmed in excess of four thousand acres. The suit concerned twenty-five contracts for the production of grain to be sold to the grain elevators. The defendants were charged with conspiracy to defraud the plaintiffs by contracting to sell more grain than they could produce. The defendants argued that under Trial Rule 20(A)¹²⁰ joinder of parties was improper because there was no right to relief from the same transaction, although the defendants did not dispute that similar questions of fact applied to all parties. The court of appeals held that there was no error in the joinder and that Trial Rule 20(A) did not require a "precise congruence of all factual and legal issues."¹²¹ The court stated further that "[a] charge of conspiracy alleges a series of transactions related by a common purpose or intent and is usually sufficient to meet the requirements of Trial Rule 20(A)."¹²²

¹¹⁶The court of appeals correctly followed the *Rankin* test in *Mobile Enterprise, Inc. v. Conrad*, 380 N.E.2d 100 (Ind. Ct. App. 1978), and *Elmore v. City of Sullivan*, 380 N.E.2d 108 (Ind. Ct. App. 1978). The court found the complaint adequate in *Conrad*, 380 N.E.2d at 102, but affirmed a dismissal in *Elmore* because of the failure to set out an ordinance in the complaint. 380 N.E.2d at 110.

¹¹⁷*Huffman v. Eastern Bartholomew Water Corp.*, 376 N.E.2d 1171, 1172 (Ind. Ct. App. 1978).

¹¹⁸*Estate of Tanasijevich v. City of Hammond*, 383 N.E.2d 1081, 1083 (Ind. Ct. App. 1978).

¹¹⁹383 N.E.2d 1061 (Ind. Ct. App. 1978).

¹²⁰IND. R. TR. P. 20(A) allows, generally, parties to be permissively joined in one action if they assert a right, or if there is asserted against them a claim, which arises out of the same transaction, occurrence, or series of transactions or occurrences, and if there is a question of law or fact common to all plaintiffs or defendants in the action.

¹²¹383 N.E.2d at 1064.

¹²²*Id.* Cf. *United Farm Bureau Family Life Ins. Co. v. Fultz*, 375 N.E.2d 601 (Ind. Ct. App. 1978) (appellate rule correctly used to interplead multiple claimants to insurance proceeds).

2. *Intervention.*—In *Indiana Bankers Association v. First Federal Savings & Loan Association*,¹²³ certain bankers petitioned to intervene pursuant to Trial Rule 24(A),¹²⁴ and alternatively under Trial Rule 24(B).¹²⁵ The petition was denied, and an appeal was effected.

The court of appeals concentrated on the question whether the order was sufficiently final, especially in light of Trial Rule 24(C),¹²⁶ to be appealed and concluded that it was not.¹²⁷ The court said, however, that Trial Rule 24(C) should be read with Appellate Rule 4(B)(5),¹²⁸ and that an appeal should be encouraged under the latter rule, thus concluding that Appellate Rule 4(B)(5) should take precedence and provide a procedural avenue for appellate review of a ruling on a motion to intervene.¹²⁹

3. *Discovery.*—In *Augustine v. First Federal Savings & Loan Association*,¹³⁰ the supreme court held that before a trial court can consider the testimony found in depositions in ruling on motions before or during trial, the deposition must be published.¹³¹ The court considered the ruling to be consistent with Trial Rule 32(B)¹³² and Indiana Code section 34-1-16-2,¹³³ and held that it was error for the court of appeals to consider the depositions in reviewing a trial court's summary judgment order.¹³⁴ The third sentence of Trial Rule

¹²³387 N.E.2d 107 (Ind. Ct. App. 1979).

¹²⁴IND. R. TR. P. 24(A) permits intervention of right.

¹²⁵IND. R. TR. P. 24(B) allows permissive intervention.

¹²⁶IND. R. TR. P. 24(C) states in part: "The [trial] court's determination upon a motion to intervene may be challenged only by appeal from the final judgment or order in the cause."

¹²⁷383 N.E.2d at 107.

¹²⁸IND. R. APP. P. 4(B)(5) allows for the appeal of an interlocutory order which is otherwise not appealable as a matter of right under IND. R. APP. P. 4(B)(1) to (4), if the order is interlocutory and if both the trial court and the appellate court certify that the order is appealable. See *Costanzi v. Ryan*, 368 N.E.2d 12 (Ind. Ct. App. 1977), the leading case on this appellate rule of procedure, discussed in Harvey, *Civil Procedure and Jurisdiction*, 1978 *Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 42, 65 (1979).

¹²⁹387 N.E.2d at 109. See also *Hinds v. McNair*, 153 Ind. App. 473, 481, 287 N.E.2d 767, 770-71 (1972), cited in *Indiana Banker's Ass'n*, 387 N.E.2d at 108.

¹³⁰384 N.E.2d 1018 (Ind. 1979).

¹³¹*Id.* at 1020. Publication is "the breaking of the sealed envelope containing the conditional examination and making it available for use by the parties or the court." *Id.*

¹³²IND. R. TR. P. 32(B) states: "Subject to the provisions of Rules 28(B) and subdivision (D)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any depositions or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying."

¹³³IND. CODE § 34-1-16-2 (1976) provides: "The record of any deposition recorded under the provisions of the last section, and copies of such record, duly certified, may be used as evidence, whenever and wherever the original deposition might be used."

¹³⁴384 N.E.2d at 1022.

56(C)¹³⁵ requires *only* that the deposition be on file, not that it be published, and it is suggested that this decision was incorrect. In addition, if the *Augustine* decision is read as reviving a pre-1970 statute on depositions,¹³⁶ it would appear to be inconsistent with a number of decisions which have held that the Trial Rules govern if they are in conflict with prior statutory or decisional law.¹³⁷

In *J.Y. v. D.A.*,¹³⁸ the court held that, in the absence of a dispositive rule on the subject, it was within the discretion of the trial court to remove sanctions for failure to make discovery imposed under Trial Rule 37(B).¹³⁹ The trial court had entered a sanction against a party in a paternity action, enjoining him from introducing evidence upon certain matters contained in interrogatories. The trial court's grant of the plaintiff's oral motion to remove the sanction was sustained by the appellate court.¹⁴⁰ In *Motor Dispatch, Inc. v. Buggie*,¹⁴¹ the court of appeals sustained a similar order from the trial court rejecting admission of certain check registers because the defendant in the action failed to comply with discovery orders issued by the trial court.¹⁴²

In the criminal case of *Crocker v. State*,¹⁴³ the appellate court sustained a trial court order which refused to permit three persons to testify for the defense.¹⁴⁴ Defense counsel had failed to comply with a court order to disclose the names of witnesses no later than fourteen days before trial.¹⁴⁵ The opposite situation developed in *Richardson v. State*.¹⁴⁶ The defendant had moved for a protective

¹³⁵IND. R. TR. P. 56(C), in its third sentence, states: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." For a correct interpretation of IND. R. TR. P. 56(C), which has little if any impact on IND. R. TR. P. 32(B), see *Smith v. P. & B. Corp.*, 386 N.E.2d 1232 (Ind. Ct. App. 1979).

¹³⁶IND. CODE ANN. § 2-1520 (Burns 1968) (repealed 1969).

¹³⁷*E.g.*, *City of Mishawaka v. Stewart*, 261 Ind. 670, 310 N.E.2d 65 (1974).

¹³⁸381 N.E.2d 1270 (Ind. Ct. App. 1978).

¹³⁹*Id.* at 1271. IND. R. TR. P. 37(B) provides for such sanctions as contempt, damages, or default, for the failure to comply with orders which compel discovery.

¹⁴⁰381 N.E.2d at 1274.

¹⁴¹379 N.E.2d 543 (Ind. Ct. App. 1978).

¹⁴²*Id.* at 545.

¹⁴³387 N.E.2d 645 (Ind. Ct. App. 1978).

¹⁴⁴*Id.* at 647.

¹⁴⁵The Indiana court held that *Washington v. Texas*, 388 U.S. 14 (1967), was distinguishable because here no arbitrary decision or rule or statute had been invoked to totally deny the defendant the right to call any one of a class of witnesses to testify. 378 N.E.2d at 647. In *Ottinger v. State*, 370 N.E.2d 912 (Ind. Ct. App. 1977), the court held that an accused forfeits his right to call a witness by his own failure to comply with discovery orders. *Id.* at 916.

¹⁴⁶388 N.E.2d 488 (Ind. 1979).

order excluding the testimony of a witness because the witness had twice failed to appear for a scheduled deposition. The trial court granted, instead, a one-day continuance so that defense counsel could examine the witness. The supreme court held that issuance of such an order was discretionary and could properly be denied when the party who seeks the discovery does not ask the court's assistance until trial has begun.¹⁴⁷

In another criminal case, the defense counsel moved to take depositions in Florida at the state's expense. The appellate court sustained the trial court's denial of the motion and observed that in view of the alternative forms of discovery, such as those provided by Trial Rule 31,¹⁴⁸ and in light of the expense to be imposed on the state by the defendant's motion, the trial court's discretion was correctly exercised.¹⁴⁹

4. *Dismissal*.—In *Noble v. Moistner*,¹⁵⁰ the trial court had entered an order of dismissal because the plaintiff failed to answer certain questions on an interrogatory, in violation of the trial court's previous order to respond and answer. The court of appeals, in an interpretation of Trial Rules 37(B)(2) and (4), required that the trial court make two determinations before granting dismissal. First, the trial court must find responsibility on the part of the party and deponent under Trial Rule 37(B)(2)(c).¹⁵¹ Such a finding generally means that the party acted in bad faith, but that determination is not needed where, as here, the trial court's order is violated. Second, the trial court must find that the conduct in question violates the rights of the opposing party in such a way that no other relief would be adequate.¹⁵² The court of appeals reversed the order dismissing the plaintiff's action and remanded the case for a specific finding on the burden of proof so that the issue of prejudice could be determined.¹⁵³

D. Trial and Judgment

1. *Trial by Jury*.—The courts discussed the right to trial by jury in two decisions, *Owens v. State ex rel. Van Natta*,¹⁵⁴ and *Hines v. Elkhart General Hospital*.¹⁵⁵

¹⁴⁷*Id.* at 490.

¹⁴⁸IND. R. TR. P. 31 provides for depositions to be taken upon written questions, cross-questions, and redirect questions.

¹⁴⁹*Haskett v. State*, 386 N.E.2d 1012, 1014 (Ind. Ct. App. 1979).

¹⁵⁰388 N.E.2d 620 (Ind. Ct. App. 1979).

¹⁵¹*Id.* at 621. IND. R. TR. P. 37(B)(2)(c) speaks of conduct which is "in bad faith and abusively resisting or obstructing a deposition . . ." or other forms of discovery.

¹⁵²388 N.E.2d at 621. See IND. R. TR. P. 37(B)(4).

¹⁵³*Id.* at 621-22.

¹⁵⁴382 N.E.2d 1312 (Ind. Ct. App. 1978).

¹⁵⁵465 F. Supp. 421 (N.D. Ind. 1979). For discussion of another aspect of this case,

In *Owens*, the Indiana Court of Appeals held that the proceeding by which Owens' driver's license had been suspended for several years did not violate a right to trial by jury under either the United States or Indiana Constitutions.¹⁵⁶ The court relied upon *Hiatt v. Yergin*¹⁵⁷ in holding that the process wherein a habitual traffic offender's driver's license is revoked is an administrative hearing, which is neither a civil nor a criminal trial to which the right of trial by jury attaches.¹⁵⁸

In *Hines*, the federal district court concluded that the Indiana Medical Malpractice Act¹⁵⁹ did not foreclose or pre-empt a right to trial by jury, in that a jury trial may eventually result after compliance with the medical malpractice statute.¹⁶⁰ The court pointed out that, unlike some statutes and decisions in other jurisdictions, the medical panel's decision was not a final determination of the medical malpractice controversy.¹⁶¹ Thus, there was no total abolition of trial by jury that had caused statutes in other states to be held unconstitutional.¹⁶²

2. *Impeachment of Jury Verdict.*—In *Henry v. State*,¹⁶³ the appellants were convicted of offenses arising from the use or sale of heroin. On appeal, the appellants argued that the jury improperly arrived at the sentences which were imposed. In support, the appellants attached to their joint motion to correct error an affidavit in which their counsel related that he had been approached after the trial by two jurors who described the manner in which the jury arrived at the sentences.

The supreme court stated that "even assuming that the trial court was bound to accept the hearsay averments of the affidavit, the use of juror's testimony . . . to demonstrate improprieties in the method by which the jury reached its verdict constitutes impeachment of that verdict by the jurors, which is not permitted."¹⁶⁴

3. *Involuntary Dismissal.*—In *Puckett v. Miller*,¹⁶⁵ the plaintiff sued the defendant for shooting and killing two of the plaintiff's dogs which were loose and roaming in the defendant's property, and appeared to be attacking certain fowl belonging to the defendant. As a part of the plaintiff's case, the plaintiff called the defendant to

see text accompanying notes 19-22 *supra*.

¹⁵⁶382 N.E.2d at 1315.

¹⁵⁷152 Ind. App. 497, 284 N.E.2d 834 (1972).

¹⁵⁸382 N.E.2d at 1315.

¹⁵⁹IND. CODE §§ 16-9.5-1-1 to -9-10 (1976 & Supp. 1979).

¹⁶⁰465 F. Supp. at 426.

¹⁶¹*Id.* at 429.

¹⁶²*Id.* at 428-29.

¹⁶³379 N.E.2d 132 (Ind. 1978).

¹⁶⁴*Id.* at 139.

¹⁶⁵381 N.E.2d 1087 (Ind. Ct. App. 1978).

the witness stand. At the conclusion of the plaintiff's case, the defendant moved for an involuntary dismissal under Trial Rule 41(B), which the trial court granted.

Each member of the three-judge panel submitted a separate opinion. The majority opinion by Judge Staton held that it was proper for the trial court to weigh evidence upon a motion made under Trial Rule 41(B) when, as in this case, both parties had testified, and "both 'versions' of the story were before the court."¹⁶⁶

Judge Chipman concurred in the result and dissented in part and, after reviewing the history of Trial Rule 41(B), concluded that only a change in the rule would allow an Indiana trial court to weigh evidence under a Trial Rule 41(B) motion.¹⁶⁷ Judge Hoffman dis-

¹⁶⁶*Id.* at 1091.

¹⁶⁷*Id.* at 1092 (Chipman, J., concurring and dissenting). Judge Chipman made specific reference to a continuing debate which has been conducted between the author and certain members of the court about the standard to be used in Trial Rule 41(B). The judge stated:

The Court of Appeals has had this similar issue before it on several previous occasions. The most recent case was *Fielitz v. Alfred*, [364 N.E.2d 786 (Ind. Ct. App. 1977)] and was commented upon by Dean William F. Harvey in his works [W. HARVEY, 3 INDIANA PRACTICE 13 (Supp. 1979)] in which he stated, "it is submitted that the Court of Appeals erred in *Fielitz*, and in the line of cases it represents." Obviously Dean Harvey is urging that Indiana follow the various Circuit Courts of Appeal that have interpreted the comparable Federal Rule as giving the trial court the right to weigh the evidence in a trial to the court in deciding a TR 41(B) motion.

381 N.E.2d at 1092 (Chipman, J., concurring and dissenting) (footnotes omitted).

Judge Chipman reviewed the original advisory committee notes in 1968, as reported in R. TOWNSEND, INDIANA RULES OF CIVIL PROCEDURE 166-69 (1968), and observed that the proposed draft of Trial Rule 41(B) was "identical to the Federal Rule and not the rule finally adopted by the Indiana Supreme Court on July 29, 1969 after enactment by the 1969 General Assembly." 381 N.E.2d at 1092. The judge then observed that even before the change by the supreme court and the legislature, the advisory committee notes stated that no change would develop in former Indiana practice by adopting the original or federal rule under Trial Rule 41(B). *Id.* at 1093. The notes cited *Garrett v. Estate of Hoctel*, 128 Ind. App. 23, 142 N.E.2d 449 (1957), to support the proposition that a trial court cannot weigh the evidence when a motion is made under Trial Rule 41(B). R. TOWNSEND, INDIANA RULES OF CIVIL PROCEDURE 169 (1968). Judge Chipman concluded his opinion by stating, "I do not feel that it is the function of the Indiana Court of Appeals to either legislate or attempt to amend the existing Trial Rules." 381 N.E.2d at 1093.

Judge Chipman is entirely correct, of course, in his view of the judicial function. Nevertheless, the Indiana Supreme Court in *P-M Gas & Wash Co. v. Smith*, 375 N.E.2d 592 (Ind. 1978), discussed in Harvey, *Civil Procedure and Jurisdiction*, 1978 *Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 42, 67-68 (1979), demonstrated that it is always within the competency of the appellate court to correct mistakes or misinterpretations of the Trial Rules, however set in precedent they might have become. In *P-M Gas* the court expressly overturned at least twelve decisions which had incorrectly interpreted Trial Rule 59. *Id.* at 597-98. That decision might be instructive here.

The *Garrett* decision was a claim in probate for services rendered to a deceased

sented, but concurred with Judge Chipman's concurring opinion.¹⁶⁸

4. *Motion for Judgment on the Evidence*.—Trial Rule 50(A) allows a motion for judgment on the evidence to be made at the close of the plaintiff's case, and after the presentation of all of the evidence. In *Ortho Pharmaceutical Corp. v. Chapman*,¹⁶⁹ the plaintiff Chapman sued the defendant for personal injury suffered as a result of taking an oral contraceptive manufactured by the defendant. The defendant offered evidence on its own behalf after the close of the plaintiff's case. As a result, any error which occurred in overruling the defendant's motion for judgment on the evidence made at the close of the plaintiff's case was waived.¹⁷⁰

The defendant renewed the motion at the close of all of the evidence. The appellate court stated that such a motion may be granted only if there is a complete failure of proof, that is, no substantial evidence or reasonable inference which is derived therefrom, supporting an essential element of the plaintiff's or non-moving party's claim.¹⁷¹

before death. After the conclusion of the plaintiff's case, the defendant "moved for judgment" and the probate court granted the motion. The Indiana Court of Appeals treated the motion as if it were one for a directed verdict in a jury case and discussed the standard for that motion against a presumption that the plaintiff's services to the deceased were a gratuity. 128 Ind. App. at 32-33, 142 N.E.2d at 453.

The conclusion is clear that either the advisory committee note could not have been correctly addressed to the committee's proposal to adopt Federal Rule 41(b), or the federal rule was plainly misunderstood by the advisory committee.

The legislature added the following words to Trial Rule 41(B): "considering all the evidence and reasonable inferences therefrom in favor of the party to whom the motion is directed, to be true, there is no substantial evidence of probative value to sustain the material allegations of the party against whom the motion is directed." That sentence merely directs the trial court's attention to the body of evidence, which under this trial rule must be considered. It did not deny to the trial court the competency to *find the facts*, after considering that evidence. That is the meaning of the very next sentence in Trial Rule 41(B): "The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."

In short, an Indiana trial court under Trial Rule 41(B) still has the power to weigh the evidence and find the facts either at the end of the plaintiff's case, or at the conclusion of the entire case, and the standards that have developed under Trial Rule 50, which are applicable to a jury trial and are a correlative diminution of a trial court's power, are not applicable to Trial Rule 41(B).

The appellate court decisions in this area, *Fieltiz v. Allred*, 364 N.E.2d 786 (Ind. Ct. App. 1976); *Building Systems, Inc. v. Rochester Metal Prods., Inc.*, 340 N.E.2d 791 (Ind. Ct. App. 1976), and several of the cases cited therein, are in error.

I would be the first to agree that the so-called legislative history on Trial Rule 41(B) is in confusion, but it cannot be understood to support the decisions which have superimposed Trial Rule 50 standards upon Trial Rule 41(B).

¹⁶⁸381 N.E.2d at 1093 (Hoffman, J., dissenting).

¹⁶⁹388 N.E.2d 541 (Ind. Ct. App. 1979).

¹⁷⁰*Id.* at 544 (citing *Meadowlark Farms, Inc. v. Warken*, 376 N.E.2d 122 (Ind. Ct. App. 1978); *Lamb v. York*, 252 Ind. 252, 247 N.E.2d 197 (1969)).

¹⁷¹388 N.E.2d at 544, 558.

The court held that the trial court must consider only the evidence and reasonable inferences which are favorable to the non-moving party, and that the motion must be denied "where there is *any* evidence or legitimate inference therefrom tending to support at least one of the allegations. Where the evidence is such that the minds of reasonable men *might* differ, a directed verdict is improper and the resolution of conflicting evidence is for the jury."¹⁷²

5. *Burden of Proof in Civil Commitment Proceedings.*—In *In re Commitment of Binkley*,¹⁷³ the court of appeals held that the standard of proof required in civil cases, proof by a preponderance of the evidence, was applicable to commitment proceedings pursuant to Indiana Code section 16-14-9.1-7.¹⁷⁴ That decision was overturned *sub silentio* by the United States Supreme Court in *Addington v. Texas*.¹⁷⁵ The Court held that an involuntary commitment proceeding in a state court pursuant to state mental health commitment law must at least meet the evidentiary standard of clear and convincing proof, and that proof by a preponderance of the evidence would not meet the requirements of the due process clause of the fourteenth amendment.¹⁷⁶

6. *Judgment in Favor of Governmental Entity.*—In *Delaware County v. Powell*,¹⁷⁷ the court of appeals held that a judgment or settlement in favor of a governmental entity "bars an action by the claimant against an employee [of the governmental entity] whose conduct gave rise to the claim resulting in the judgment or settlement."¹⁷⁸

¹⁷²*Id.* at 544 (quoting *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 606-07, 349 N.E.2d 173, 179 (1976)). The leading Indiana case, cited by the court, 388 N.E.2d at 544, is *Huff v. Travelers Indem. Co.*, 266 Ind. 414, 363 N.E.2d 985 (1977). *Huff* cites, in turn, to *Vernon*. *Id.* at 421, 363 N.E.2d at 990. There is a difference in the two opinions which has caused some confusion. The court in *Huff* stated that a trial court may enter judgment only if there is no substantial evidence, or reasonable inference to be adduced therefrom, to support an essential element of the plaintiff's claim. *Id.* The court in *Vernon* indicated that if *any* evidence tends to support at least one of the plaintiff's allegations, a motion for judgment on the evidence directed against the plaintiff's case must be denied. 264 Ind. at 606, 349 N.E.2d at 179.

The language in *Huff* would allow a trial court to determine that evidence was not available which would allow a reasonable inference in support of a plaintiff's allegation, but under *Vernon* a trial court is not permitted to make even that determination. The language in *Vernon* will lead, logically, to the scintilla rule, of which the court in *Huff* specifically disapproved. 266 Ind. at 422, 363 N.E.2d at 990.

¹⁷³382 N.E.2d 952 (Ind. Ct. App. 1978).

¹⁷⁴382 N.E.2d at 955. *But cf.* *State ex rel. Kiritsis v. Marion County Probate Court*, 381 N.E.2d 1245 (Ind. 1978) (privilege against self-incrimination not applicable to civil commitment proceedings).

¹⁷⁵99 S.Ct 1804 (1979).

¹⁷⁶*Id.* at 1810.

¹⁷⁷382 N.E.2d 958 (Ind. Ct. App. 1978).

¹⁷⁸*Id.* at 963 (quoting IND. CODE § 34-4-16.5-5(a) (1976)).

7. *Reinstatement of Dismissed Claim.*—*State ex rel. Jansville Auto v. Superior Court*,¹⁷⁹ concerned a motion under Trial Rule 60(B)(8)¹⁸⁰ to reinstate an action which had been dismissed under Trial Rule 41(E)¹⁸¹ for failure to prosecute or proceed with it. The action, filed originally in April 1972, had been dismissed by the trial court in January 1975 because it had not proceeded. In September 1977 the plaintiff was granted reinstatement by the trial court. The Indiana Supreme Court held that the trial court had the discretion to determine what constituted a reasonable time within the meaning of Trial Rule 60(B) and that it would review only for an abuse of that discretion.¹⁸² Here it appeared that the plaintiff did not receive notice of the dismissal of the cause, and the trial court correctly reinstated the action.

8. *Clerical Mistakes.*—In *Drost v. Professional Building Service Corp.*,¹⁸³ the court of appeals held that a clerical mistake in a judgment, which arose from an oversight or omission, could be corrected even though the mistake was observed after an appeal and “could have been raised in the appeal had proper diligence been exercised.”¹⁸⁴ If the mistake were one of substance, however, then the principle of finality would prevent its correction after the appeal had been taken and concluded.¹⁸⁵

9. *Preliminary Injunctions.*—In *Rees v. Panhandle Eastern Pipe Line Co.*,¹⁸⁶ the plaintiff had an easement through property owned by the defendant Rees. Rees interfered with the plaintiff's efforts to clear trees and brush from the easement, and the plaintiff obtained a preliminary injunction against Rees' interference.

On appeal, the court stated that a preliminary injunction can be supported by affidavits, without oral evidence, and that it can be granted on the plaintiff's affidavit alone.¹⁸⁷ Regarding the showing necessary to make a prima facie case for the issuance of a preliminary injunction, the court adopted the language of *Indiana Annual Conference Corp. v. Lemon*,¹⁸⁸ which established that a party

¹⁷⁹387 N.E.2d 1330 (Ind. 1979).

¹⁸⁰In addition to the specific grounds for relief from judgment enumerated in IND. R. TR. P. 60(B)(1) to (7), 60(B)(8) provides for relief from judgment for “any other reason justifying relief.”

¹⁸¹IND. R. TR. P. 41(E) provides for dismissal of a civil action for failure to take any action for a period of 60 days.

¹⁸²*Id.* at 1331-32.

¹⁸³375 N.E.2d 241 (Ind. Ct. App. 1978).

¹⁸⁴*Id.* at 244. IND. R. TR. P. 60(A) provides for the correction by the court on its own initiative of clerical errors in judgments and orders.

¹⁸⁵375 N.E.2d at 244.

¹⁸⁶377 N.E.2d 640 (Ind. Ct. App. 1978).

¹⁸⁷*Id.* at 645.

¹⁸⁸235 Ind. 163, 167, 131 N.E.2d 780, 782, (1956).

must show a necessity for maintaining the status quo¹⁸⁹ prior to trial, yet need not produce evidence sufficient for a favorable decision on the merits.¹⁹⁰

E. Appeals

1. *Motion to Correct Errors: P-M Gas and Its Progeny.*—In *P-M Gas & Wash Co. v. Smith*,¹⁹¹ the supreme court effected major changes in trial and appellate practice, in relation to Trial Rule 59 and the procedure for perfecting an appeal. Because *P-M Gas* has become critical to Indiana appellate practice, the opinion and its subsequent interpretations require an extensive analysis here.

The case was in the supreme court on transfer from the court of appeals, which had dismissed a cross-appeal by the plaintiff Smith.¹⁹² The court of appeals had ruled that Smith had not complied with Trial Rule 59(D) on assigning cross-errors and thus dismissed Smith's cross-appeal.¹⁹³

After the jury verdict, Smith had filed a motion to correct error which was granted in the trial court and a new trial was ordered. At that point, the defendant-appellant filed a motion to correct error and perfected its appeal. In his appellate brief, Smith cross-assigned error and raised those questions found in his original motion to correct error which had been overruled by the trial court.

The supreme court in *P-M Gas* overruled twelve decisions which had required the filing of a second motion to correct error if, as a result of the first motion to correct errors, a trial court had effected a change other than granting a new trial in a final order or judgment.¹⁹⁴

The court held that Appellate Rule 4(A)¹⁹⁵ should be understood to allow either, or any, party to appeal a ruling on a motion to correct error.¹⁹⁶ Trial Rule 59(G) requires a party to make a motion to correct error if that party seeks to raise error which occurred at

¹⁸⁹Status quo means that the parties should be placed in their "non-contested" position, that is, the "last actual, peaceable, and non-contested status which preceded the pending controversy." 377 N.E.2d at 646 (quoting *Professional Beauty Prod., Inc. v. Schmid*, 497 S.W.2d 597, 599 (Tex. Ct. App. 1973)).

¹⁹⁰377 N.E.2d at 646.

¹⁹¹375 N.E.2d 592 (Ind. 1978), discussed in Harvey, *Civil Procedure and Jurisdiction*, 1978 *Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 42, 67-68 (1979).

¹⁹²352 N.E.2d 91 (Ind. Ct. App. 1976).

¹⁹³*Id.* at 93.

¹⁹⁴375 N.E.2d at 594.

¹⁹⁵IND. R. APP. P. 4(A) states in part: "A ruling or order by the trial court granting or denying a motion to correct errors shall be deemed a final judgment, and an appeal may be taken therefrom."

¹⁹⁶375 N.E.2d at 595.

trial or later in a verdict or judgment. But once a motion to correct error is made, a second motion should never be required from that party.¹⁹⁷

The court also ruled that Trial Rule 59(D) is applicable only when matters *dehors* the record are raised.¹⁹⁸ The parties in this case agreed that no matter *dehors* the record was presented in the appeal.¹⁹⁹

The court explained that

a motion to correct error served three purposes: (1) to present to the trial court an opportunity to correct error which occurs prior to the filing of the motion; (2) to develop those points which will be raised on appeal by counsel; and (3) to inform the opposing party concerning the points which will be raised on appeal so as to provide that party an opportunity to respond in the trial court and on appeal.²⁰⁰

Thus the court held that "[o]ne motion for each party or each appellant, if there is more than one, shall be sufficient,"²⁰¹ and that a "second motion to correct error is not needed, and it is not required by the second sentence found in [Trial Rule] 59(G)."²⁰²

The court, recognizing that it had substantially changed past appellate practice even though it had not altered the language of Trial Rule 59, made a number of rulings, anticipating probable questions which might arise in view of the principal decision. A summary of those rulings follows:

(1) Party Y received relief on a motion to correct error; party X will complain about it on appeal, and can commence an appeal under Appellate Rule 2(A)²⁰³ without making a motion to correct error. X

¹⁹⁷*Id.*

¹⁹⁸*Id.* at 596.

¹⁹⁹The decision in *In re Marriage of Myers*, 387 N.E.2d 1360 (Ind. Ct. App. 1979), is instructive on Trial Rule 59(D). There, an affidavit executed by an attorney concerning a conversation he had with the trial judge suggested that the trial judge had incorrectly interpreted a statute which speaks to the best interest of a child in a custody dispute. The appellate court held that because the affidavit, made under Trial Rule 59(D) and raising matters outside the record, was not contradicted by the opposing attorney or the trial judge, it would be accepted as true and the appeal would be determined on that basis. *Id.* at 1362.

²⁰⁰375 N.E.2d at 594. See the discussion of the purpose of a motion to correct error in *Libunao v. Libunao*, 388 N.E.2d 574, 578 (Ind. Ct. App. 1979).

²⁰¹375 N.E.2d at 595.

²⁰²*Id.* In *Bridge v. Board of Zoning Appeals* 381 N.E.2d 1060 (Ind. 1978), the appellant filed a motion to correct error in the trial court, which was granted in part. An appeal to the court of appeals was dismissed because a second motion to correct error had not been made. On transfer, the supreme court reversed and remanded the case to the court of appeals for an opinion on the merits. *Id.* at 1061.

²⁰³IND. R. APP. P. 2(A) states in part: "An appeal is initiated by filing with the

would then become the appellant, who would appeal the disposition made on Y's motion to correct error. The court stated: "If appellant seeks [only to appeal the favorable relief given to the appellee] because it was incorrect . . . , then it is not necessary for the appellant to do more than request relief on brief in the appellate court."²⁰⁴

These facts were present in *Schmal v. Ernst*.²⁰⁵ There, Schmal appealed because escrow money of \$1,200 was given to Ernst, but was not credited against a judgment of \$12,500. This fact was stated in Ernst's motion to correct error. The appellate court observed that "Schmal was not required to file a motion to correct errors on his own behalf since the only error alleged is the failure of the court to apply the \$1,200 against the judgment."²⁰⁶

(2) If an appellee in the appellate court does no more than answer the appellant's positions and brief, then it is not necessary for the appellee to file a motion to correct error in the trial court. Here an appeal would be perfected from a trial error. Normally, of course, it would be the appellant who would perfect that appeal. The critical distinction which the court made in this situation was between that party who suffered some kind of adverse ruling or disposition before the verdict or judgment, which can be raised only by first making a motion to correct that claimed error, and the party who is now responding, on appeal, to a disposition made in the trial court on another party's motion to correct error.

(3) If the appellant is a party who, for example, seeks to reinstate a jury verdict in his favor which was changed on the appellee's motion to correct error, it is *not* necessary for the appellant to file a motion to correct error if the appellant does not himself raise error adverse to the appellant which occurred before the appellee's motion to correct error. Thus, it is not necessary for the appellant to do more than request relief on brief in the appellate court, after initiating the appeal under the Appellate Rules.

In the foregoing situation, "the complaint on appeal will be measured . . . by the original verdict and judgment and the motion to correct error filed by the appellee *and* the favorable relief given to that motion by the trial court."²⁰⁷

(4) If a party was harmed by error which occurred prior to a verdict or judgment, that party must file a motion to correct error in

clerk of the trial court a praecipe designating what is to be included in the record of proceedings"

²⁰⁴375 N.E.2d at 597.

²⁰⁵387 N.E.2d 96, 98 (Ind. Ct. App. 1979).

²⁰⁶*Id.* at 98.

²⁰⁷395 N.E.2d at 597. See *DeHart v. Anderson*, 383 N.E.2d 431, 434 (Ind. Ct. App. 1978).

order to raise that claimed error on appeal. The errors claimed in the motion to correct error form the basis for his "complaint on appeal."²⁰⁸

An appellee who wants to raise error adverse to him in the course of a trial must also make a motion to correct error. Such a situation could occur when the appellee believes that a judgment which he received might be overturned by the appellate court. Rather than having the appellate court reverse and enter judgment for the appellant, the appellee might be entitled to a new trial. This situation, it is suggested, prompted the supreme court to state the following:

If each party makes a motion to correct error, then each can raise the ruling on that motion and the ruling on the other party's motion on appeal as cross-errors, respectively.

... If a party does not make a motion to correct error, he has nothing belonging to him which can be appealed, unless, of course, he is harmed if the other party moves to correct error and the motion is granted in some aspect.²⁰⁹

A major problem remaining after the *P-M Gas* decision concerns the time for making the motion. If an appellant waits until the fifty-ninth day to make a motion to correct error, the appellee may not have sufficient time to make a motion if he wants to raise error on appeal. In this situation, absent a change in the rule, the appellee should be entitled to relief under Trial Rule 60, which provides for relief from judgment, and a trial court should entertain his motion as if it were made under Trial Rule 59.

Another major problem relates to the finality of the order or judgment which the trial court enters. For example, suppose a motion to correct error is made, and the trial court enters an order which is not, in fact, responsive to the motion and does not alter the judgment to which the motion was directed. Perhaps a second motion to correct error is filed by the appellant several days later, and the trial court then enters an order correcting the preceding order and amending the judgment. Question: When does time begin to run for filing the praecipe under Appellate Rule 2(A), which is jurisdictional?

It is suggested that time should begin to run from the order or entry which the trial court regards as its final entry or order and one which finally concludes all matters or questions in the trial court, even if the last entry came as a result of an unnecessary, but

²⁰⁸375 N.E.2d at 597.

²⁰⁹*Id.*

permitted, second or third motion to correct error. If it is necessary to make more than one motion to obtain a clear and final entry by the trial court, the praecipe should be filed and time should run from that last or final entry, and not from the first response to the initial motion to correct error.

2. *New Trial Limited to Damages Only.*—In *State v. Tabler*,²¹⁰ substantial evidence was offered which showed that one plaintiff sustained a loss of \$12,000 in wages, \$31,000 in medical bills, and eighty-five percent disability because of injuries which were described as “horrible.” Even so, the jury awarded only \$7,500 for that plaintiff. Awards to other plaintiffs were also well below that warranted by the evidence. The trial court granted the plaintiffs’ motions to correct errors and awarded a new trial solely on the issue of damages, unless the State would agree to additur in an amount in excess of \$800,000.

On appeal, the court reiterated the principle that a new trial could be limited solely to the issue of damages or, alternatively, additur, although that limitation was not proper in this case.²¹¹ The court cautioned that a new trial limited to damages was proper only when it was clear that the verdict was not a product of compromise, and that when liability was close and other evidence indicated that the jury might have been compromised, a new trial on damages alone would be improper.²¹²

3. *Raising Different Questions on Appeal.*—A party who has made a motion to correct error cannot raise an error or question on appeal different from that which was addressed in his motion, nor can he raise for the first time a question in a motion to correct error which was not preserved during trial by objection or an offer to prove. These statements of law appear often in the appellate court decisions in Indiana, and they raise the inference that trial court practice is not as carefully done as it should be.²¹³

4. *Newly Discovered Evidence.*—The civil case of *Legon Specialized Hauler, Inc. v. Hott*,²¹⁴ and the criminal case of *Bryant v. State*,²¹⁵ support the proposition that a new trial on the basis of newly discovered evidence will be granted if the petitioner can show:

- (1) that the evidence has been discovered since the trial;
- (2) that it is material and relevant; (3) that it is not

²¹⁰381 N.E.2d 502 (Ind. Ct. App. 1978).

²¹¹*Id.* at 504-06.

²¹²*Id.* at 506.

²¹³*E.g.*, *Contech Architects & Eng’rs, Inc. v. Courshon*, 387 N.E.2d 464, 467-68 (Ind. Ct. App. 1979).

²¹⁴384 N.E.2d 1071 (Ind. Ct. App. 1979).

²¹⁵385 N.E.2d 415 (Ind. 1979).

cumulative; (4) that it is not merely impeaching; (5) that it is not privileged or incompetent; (6) that due diligence was used to discover it in time for trial; (7) that the evidence is worthy of credit; (8) that it can be produced upon a retrial of the case; and (9) that it will probably produce a different result.²¹⁶

5. *Small Claims*.—In *Reynolds v. Meehan*,²¹⁷ the court of appeals held that the motion to correct error was the correct and proper method by which an appeal is to be effected from a county court, and that the motion must be filed in compliance with Trial Rule 59.²¹⁸

6. *Entry of Appealable Final Judgment of Order*.—Final orders and judgments are defined, generally, in Indiana by case law as well as by trial rules. A final order or judgment is one which finally determines the rights of the parties involved. If a final judgment or order does not dispose of all of the issues, it will be appealable if it disposes of some distinct and definite branch of the proceeding and leaves no further determination to be made by the trial court on that particular issue.²¹⁹

Trial Rule 54(B)²²⁰ and Trial Rule 56(C)²²¹ each define "finality."²²² An order under Trial Rule 23(C)(1), which allows an action to exist as a class action, is a final determination and appealable as such.²²³ However, a discovery order or an order effecting discovery, without

²¹⁶*Id.* at 421 (quoting *Tungate v. State*, 238 Ind. 48, 54-55, 147 N.E.2d 232, 235-36 (1958)).

²¹⁷375 N.E.2d 1119 (Ind. Ct. App. 1978).

²¹⁸*Id.* at 1122. In *Strube v. Sumner*, 385 N.E.2d 948 (Ind. Ct. App. 1978), the court of appeals sustained MARION COUNTY R. SM. CL. 16(B), which requires the appellant to post an appeal bond in appealing from the Marion County Small Claims Court to the Marion County Superior Court, against a constitutional attack made under the equal protection clause of the Indiana Constitution, art. 1, § 12, and the fourteenth amendment to the United States Constitution. 375 N.E.2d at 952. The small claims court had set Strube's appeal bond at \$1,215.04. Compare IND. CODE § 33-11.6-4-5 (1976), under which MARION COUNTY R. SM. CL. 16(B) was adopted, with IND. CODE § 33-11.6-6-10 (1976 & Supp. 1979) (effective Jan. 1, 1979).

²¹⁹*Hansbrough v. Indiana Revenue Bd.*, 164 Ind. App. 56; 61, 326 N.E.2d 599, 602 (1975).

²²⁰IND. R. TR. P. 54(B) states in part that a trial court may direct the entry of a final judgment on fewer than all of the claims of the parties "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

²²¹IND. R. TR. P. 56(C) allows the entry of a final judgment on an order for summary judgment which is directed to less than all of the issues involved.

²²²*Stanray Corp. v. Horizon Constr., Inc.*, 342 N.E.2d 645 (Ind. Ct. App. 1976), is a leading Indiana case on the subject. See also *Geyer v. City of Logansport*, 317 N.E.2d 893 (1974).

²²³*Gulf Oil Corp. v. McManus*, 363 N.E.2d 223 (Ind. Ct. App. 1977).

a special certification under Appellate Rule 4(B)(5), is not appealable as an interlocutory order.²²⁴

In *Hudson v. Tyson*,²²⁵ the court of appeals held that a trial court order which directs a defendant to make payment to the plaintiff is a final judgment and not an interlocutory order appealable under Appellate Rule 4(B).²²⁶ No motion to correct error need be filed in order to perfect an appeal from an interlocutory order.²²⁷ If a motion to correct error is filed, however, then the time sequence which is built into that motion will control the time sequence in the appeal. Nevertheless, the court appeared to hold that the final judgment in these circumstances might be appealed as if it were an interlocutory order or judgment.²²⁸ If so, the time sequence established for an interlocutory order appeal would control the appeal. The court's opinion appears to be squarely opposite to the same court's opinion in *Protective Insurance Co. v. Steuber*.²²⁹

In *Pounds v. Pharr*,²³⁰ the court of appeals held that a default entry not reduced to judgment is a final and therefore appealable order.²³¹

7. *Appeals: Interlocutory Orders.*—The circuit court in *In re Estate of Garwood*²³² had entered an order which directed a special administrator of an estate to effect the sale of certain real property in the estate to a buyer. The order was entitled a "judgment," but the court of appeals did not accept it as a final judgment or appealable as such.

The majority held that the order to sell real estate was interlocutory under Appellate Rule 4(B)(2).²³³ Because the appeal was effected pursuant to a motion to correct error, and not pursuant to the filing of the record of proceedings within thirty days under Appellate Rule 3(B),²³⁴ the appeal was dismissed sua sponte.²³⁵

A concurring opinion said that the appellate court had the authority to remand the case to the trial court for determination of

²²⁴*Greyhound Lines, Inc. v. Vanover*, 160 Ind. App. 289, 311 N.E.2d 632 (1974).

²²⁵383 N.E.2d 66 (Ind. Ct. App. 1978).

²²⁶*Id.* at 69-71.

²²⁷IND. R. TR. P. 59(G).

²²⁸383 N.E.2d at 72.

²²⁹370 N.E.2d 406 (Ind. Ct. App. 1977).

²³⁰376 N.E.2d 1193 (Ind. Ct. App. 1978).

²³¹*Id.* at 1194-95.

²³²382 N.E.2d 1020 (Ind. Ct. App. 1978).

²³³*Id.* at 1021. IND. R. APP. P. 4(B)(2) provides for the appeal of an interlocutory order, as of right, which is "[f]or the delivery of the possession of real property or the sale thereof"

²³⁴Under IND. R. APP. P. 3(B), appeals of interlocutory orders shall have the record of proceedings filed within 30 days of the interlocutory ruling being appealed.

²³⁵382 N.E.2d at 1022.

whether the order was appealable as a final order under Trial Rule 54(B), but that remand was not proper here.²³⁶

8. *Remittitur*.—In a condemnation action against certain church property for the purpose of highway construction, the court of appeals had concluded that the award was nearly \$17,000 over and above any proper evidence of the highest damages assessable, and ordered a remittitur of that amount.²³⁷ The supreme court held that the authority of an appellate court to modify judgments was not only inherent but also specifically provided in Appellate Rule 15(N)²³⁸ and Indiana Code section 34-5-1-2.²³⁹ That authority includes, in a proper case, the power “to direct a remittitur or to affirm, conditioned upon a remittitur.”²⁴⁰ The supreme court believed, however, that the court of appeals might have speculated on certain evidence in the case, and concluded that additional determinations were needed in the courts below.²⁴¹

²³⁶*Id.* at 1023 (Lybrook, J., concurring).

²³⁷*State v. Church of the Nazarene*, 354 N.E.2d 320, 324 (Ind. Ct. App. 1976).

²³⁸IND. R. APP. P. 15(N) provides in part: “An order or judgment upon appeal may be reversed as to some or all of the parties and in whole or in part.”

²³⁹377 N.E.2d 607, 610 (Ind. 1978). *See* IND. CODE § 34-5-1-2 (1976).

²⁴⁰*Id.* at 610.

²⁴¹*Id.* at 611.

IV. Constitutional Law

In the two centuries of America's history, courts considering constitutional questions have intruded into social, economic, and political areas by relying on the equal protection clause, the due process clause, the contract clause, and the commerce clause or by liberally construing constitutional provisions to fit their policies. Some commentators have observed that the courts are becoming less intrusive in these areas and are deferring such matters to the legislatures.¹ According to Professor Bickel, this trend reflects the courts' limited ability to establish and implement policy in social, economic, and political areas.²

During the survey period, state and federal appellate courts interpreting Indiana law issued a number of controversial decisions which raised questions about the proper role of courts in determining constitutional issues affecting social, economic, and political policies. The courts continued to recognize that matters affecting religion, free expression, and the free petition of government involve fundamental rights which deserve the protection afforded by a high level of judicial review.³ The state and federal courts generally recognized that social, political, and economic issues do not involve fundamental rights and therefore warrant low level review,⁴ except when suspect classes are involved.⁵

Nevertheless, in two cases, the courts deviated from the tradi-

¹See, e.g., A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 179 (1st ed. 1970).

²*Id.* at 175.

³See *Citizens Energy Coalition, Inc., v. Sendak*, 459 F. Supp. 248 (S.D. Ind. 1978), *aff'd*, 594 F.2d 1158 (7th Cir. 1979); *International Soc'y for Krishna Consciousness v. Bowen*, 456 F. Supp. 437 (S.D. Ind. 1978), *aff'd*, 602 F.2d 597 (7th Cir. 1979); *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 380 N.E.2d 1225 (Ind. 1978); *Lynch v. Indiana State Univ. Bd. of Trustees*, 378 N.E.2d 900 (Ind. Ct. App. 1978), *cert. denied*, 99 S. Ct. 2166 (1979). In general, courts apply high level review or strict scrutiny to matters affecting fundamental rights or suspect classes. Briefly considered, high level review or strict scrutiny requires that the challenged state action promote a compelling state interest and that the means chosen to promote that interest are narrowly tailored. *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976) (patronage dismissals not only failed to serve compelling state interest outweighing the first amendment rights of political belief and association but also failed to provide the least restrictive alternative).

⁴E.g., *Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421 (N.D. Ind. 1979). Low level review requires only that the challenged state action serve a permissible state interest and that the means chosen be rationally related to that interest. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

⁵See *Trimble v. Gordon*, 430 U.S. 762 (1977).

tional rule of deference and adopted solutions to social problems.⁶ The criticism and resistance provoked by these decisions invite serious questions about judicial effectiveness in solving complex social issues that may be addressed more adequately by other government branches or even by private individuals.⁷ Consequently, the developments within the field of constitutional law in Indiana during the survey period provide an interesting background for evaluating the role of the judiciary in today's society.

A. State Decisions

1. *Constitutionality of Pari-Mutuel Betting.*—The Indiana Supreme Court in *State v. Nixon*⁸ decided that pari-mutuel betting constituted a lottery within the definition of the Indiana constitutional provision prohibiting lotteries⁹ and thus found the Pari-Mutuel Wagering Act¹⁰ unconstitutional.¹¹ The controversial decision renewed debate about the proper role of the judiciary in determining social policy vis-a-vis the other branches of government.

The majority opinion emphasized the tradition of liberal construction of constitutions. Relying on a string of decisions which reached pragmatic solutions by broadly interpreting constitutional language,¹² the court concluded that the primary aim of the constitutional prohibition against lotteries was to reduce the "harmful effects" of gambling businesses operated by purveyors.¹³ Applying this interpretation of the 1852 Constitution to the pari-mutuel law, the court held: "*The pari-mutuel system is a purveying of a gaming enterprise which, because of the retainage of a percentage of all wagers, precludes the players, in sustained play, from winning while providing a reasonable assurance of a profit to the operators.*"¹⁴ The court reasoned that pari-mutuel betting would produce the same effects that the constitutional authors sought to preclude by prohibiting lotteries and therefore construed pari-mutuel betting to be a lottery within the definition of the constitutional provision.¹⁵ The

⁶*United States v. Board of School Comm'rs*, 573 F.2d 400 (7th Cir.), *on remand*, 456 F. Supp. 183 (S.D. Ind.), *cert. denied*, 99 S. Ct. 93 (1978); *State v. Nixon*, 384 N.E.2d 152 (Ind. 1979).

⁷BICKEL, *supra* note 1, at 106-07.

⁸384 N.E.2d 152 (Ind. 1979).

⁹IND. CONST. art. 15, § 8. Section 8 states: "No lottery shall be authorized nor shall the sale of lottery tickets be allowed." *Id.*

¹⁰IND. CODE §§ 4-25-1-1 to -6-15 (Supp. 1979).

¹¹384 N.E.2d at 162.

¹²*Id.* at 156-58.

¹³*Id.* at 161 (citing *State ex rel. Sorensen v. Ak-Sar-Ben Exposition Co.*, 118 Neb. 851, 226 N.W. 705 (1929)).

¹⁴384 N.E.2d at 161.

¹⁵*Id.*

court explained that lotteries were a "symbol" of the mischief that the constitution attempted to eliminate¹⁶ and that limiting the definition¹⁷ of lottery to a game of chance by lot would constitutionalize many forms of gambling contrary to the intent of the framers.¹⁸

The majority decision provoked two dissents. Justice DeBruler noted that thirteen jurisdictions with similar constitutional prohibitions against lotteries have decided that pari-mutuel betting is not a lottery.¹⁹ He stated that history and logical analysis support the conclusion that a lottery consists of consideration, a prize, and chance.²⁰ Justice DeBruler found that pari-mutuel betting involves skill and does not therefore come within the definition of lottery.²¹

Concurring with DeBruler's dissent, Justice Hunter attacked the majority decision as judicial legislation. Hunter stated: "It seems quite apparent that the majority opinion has resorted to a public policy reasoning under the guise of liberal constitutional interpretation."²² Hunter explained that the majority's liberal definition of lotteries allowed the court to establish its own views of sociological problems as public policy.²³ Hunter concluded that such judicial interpretations are an encroachment upon the legislative and executive functions.²⁴

Justice Hunter's dissent suggests that the majority ignored its obligation to uphold the constitutionality of the Pari-Mutuel Wagering Act if reasonable construction of the Act would demonstrate its

¹⁶*Id.*

¹⁷The *Nixon* court observed that *Tinder v. Music Operating, Inc.*, 287 Ind. 33, 40, 142 N.E.2d 610, 614 (1957), defined lottery as a game of chance consisting of consideration, a prize, and chance. 384 N.E.2d at 155-56. Thus, the *Nixon* court found that pari-mutuel betting constituted a lottery under the literal definition proposed by *Tinder*. *Id.* at 156. The court reached that conclusion by an analysis of the sport, explaining that pari-mutuel betting is a system of wagering that is based upon the outcome of a race, the combination of other wagerers, and their selection of horses as well as wager amounts. *Id.* Recognizing that players can control their bets by the exercise of judgment and skill, but not the bets of other players, the court concluded that pari-mutuel betting constitutes a lottery under a literal definition. *Id.* Although the court found such wagering to be a lottery under the principles of *Tinder*, the court eschewed the literal definition of lottery by deciding that the constitution requires a practical, common sense definition of lottery that focuses on whether the game precludes "the participants in sustained play from winning while providing a reasonable expectancy of profit for the sponsors." *Id.* at 161.

¹⁸384 N.E.2d at 161.

¹⁹*Id.* at 162 (DeBruler, J., dissenting).

²⁰*Id.* at 163 (DeBruler, J., dissenting) (citing *Tinder v. Music Operating, Inc.*, 237 Ind. 33, 40, 142 N.E.2d 610, 614 (1957)).

²¹384 N.E.2d at 164-65 (DeBruler, J., dissenting).

²²*Id.* at 165 (Hunter, J., dissenting).

²³*Id.* at 166 (Hunter, J., dissenting).

²⁴*Id.* (Hunter, J., dissenting).

constitutional validity.²⁵ The court's tortured effort to expand the definition of lottery does not evidence reasonable construction but, rather, an overt imposition of judicial legislation.

2. *Religion Clauses.*—The Indiana²⁶ and United States Constitutions²⁷ protect the free exercise of religion and guarantee state neutrality toward religion. Two Indiana decisions examined the contours of the establishment and free exercise issues during the last term.

The Indiana Supreme Court, in *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*,²⁸ decided that the Indiana regulation requiring every driver's license to have a photograph of the driver²⁹ violated the free exercise clauses of the Indiana and United States Constitutions when applied to members of certain religions.³⁰ *Pentecostal House* involved a complaint filed by religious groups who argued that their religions prevented them from posing for photographs as required by the Indiana regulation. The trial court declared that the statute was unconstitutional as applied to the religious groups because the bureau could not show a compelling interest to satisfy the photograph requirement.³¹

On appeal, the Indiana Supreme Court considered the issue of whether the state's requirement of a photograph constituted coercive state action that infringed on the religious freedom of the groups. Before addressing the principal issue in the case, the court stated that the appellee religious groups had the burden of proof that the photo requirement impaired the free exercise of their religious beliefs.³² The court stated that if the appellees could show impairment, then the bureau had the burden to show either that its actions did not violate the appellees' religious freedom or that the state had a compelling interest which allowed infringement.³³ Asserting that no first amendment issue arises when free exercise rights

²⁵*Fairchild v. Schanke*, 232 Ind. 480, 113 N.E.2d 159 (1953). The court in *Fairchild* stated: "We recognize the well-established principle that it is the duty of this court to sustain the constitutionality of an act of the legislature if it can be done by a reasonable construction. Any doubt . . . must be resolved in favor of its validity." *Id.* at 483, 113 N.E.2d at 161.

²⁶IND. CONST. art. 1, §§ 2, 3 (freedom of religious belief and exercise); *id.* § 4 (state neutrality toward religion).

²⁷U.S. CONST. amend. I (free exercise and establishment clauses).

²⁸380 N.E.2d 1225 (Ind. 1978).

²⁹IND. CODE § 9-1-4-37(b) (1976). The provision states: "Every such permit or license shall bear . . . with the exception of a learner's permit, a photograph of such person for the purpose of identification" *Id.*

³⁰380 N.E.2d at 1228-29.

³¹*Id.* at 1227.

³²*Id.* at 1228.

³³*Id.*

conflict with a mere privilege, the bureau argued that the first amendment claim was meritless because driving is a privilege.³⁴ The court dismissed this argument, relying on the Supreme Court decision in *Sherbet v. Verner*³⁵ that religious exercise is "infringed by denial of or by placing conditions upon a benefit or privilege."³⁶ Thus, the court concluded that the photograph requirement restricted the ability of the burdened class to drive, "regardless of whether this ability is characterized as a right or privilege."³⁷

Finding the appellees' religious beliefs had been violated, the court then considered whether the bureau had demonstrated an interest so compelling as to justify infringement of the appellees' privilege. The bureau argued that its interest in insuring driver competency requires constant observation of each driver's ability and that prompt identification aids such inspections.³⁸ Rejecting this justification, the court observed that a number of alternative means of efficient identification, which do not violate individual religious freedom, were available to the state.³⁹ The court found, in addition, that a photograph on a driver's license bears no relationship to driver competency and thus concluded that the bureau had failed to demonstrate a compelling governmental interest.⁴⁰

The Indiana Court of Appeals in *Lynch v. Indiana State University Board of Trustees*⁴¹ treated free exercise and establishment issues arising out of a college professor's practice of reading from the Bible at the beginning of each class. The court decided that this practice violated the students' free exercise of religion even though the students had the option of leaving the classroom during the reading period.⁴² Relying on United States Supreme Court opinions indicating that the option of leaving a classroom does not eliminate the pressure to conform,⁴³ the court concluded that the pressure to conform which resulted from the professor's control over student grades and conduct as well as from peer pressure exerted a "chilling effect" or even a "coercive effect" on the free exercise of the students' religious rights.⁴⁴

³⁴*Id.* at 1229.

³⁵374 U.S. 398 (1963).

³⁶380 N.E.2d at 1229 (quoting *Sherbet v. Verner*, 374 U.S. at 404).

³⁷380 N.E.2d at 1229.

³⁸*Id.*

³⁹*Id.* The court observed: "For example, the statistics which are traditionally included on a driver's license, such as license number, height, weight, eye and hair color, have long proven adequate to aid the Bureau to fulfill its important duties." *Id.*

⁴⁰*Id.*

⁴¹378 N.E.2d 900 (Ind. Ct. App. 1978), *cert. denied*, 99 S. Ct. 2166 (1979).

⁴²378 N.E.2d at 903.

⁴³*Id.* (citing *McCullum v. Board of Educ.*, 333 U.S. 203 (1948); *Abington School Dist. v. Schempp*, 374 U.S. 203, 289-90 (1963) (Brennan, J., concurring)).

⁴⁴378 N.E.2d at 903.

The professor argued that termination of his employment by Indiana State University (I.S.U.) impermissibly infringed upon the free exercise of his religious beliefs. Rejecting this argument, the court held that when one person's exercise of religion restricts another's right to believe, the "freedom to act" will be subordinated.⁴⁵ In support of this conclusion, the court observed that religious beliefs are absolutely privileged, while religious exercise is subject to narrow regulation in some instances "for the protection of society."⁴⁶ Relying on several Supreme Court decisions,⁴⁷ the court enunciated a substantive standard for reviewing claims of free exercise violations: Limitation of religious practice is permissible only upon a showing that the practice either restricts the free exercise of religious belief or interferes with a state interest which is more compelling than the interest claiming protection under the free exercise clause.⁴⁸

In analyzing whether the Bible reading practice impinged on the free exercise of belief, the court concluded that the practice violated the students' absolute right to believe,⁴⁹ and thus became subject to limitation as a religious exercise which infringed upon another person's religious right.⁵⁰

The court also decided that the university's interests were substantially greater than the teacher's interest under the free exercise clause, thereby justifying the university's discharge of the professor.⁵¹ The court found that I.S.U. had a substantial interest in preserving religious neutrality as required by the establishment clause of the first amendment⁵² and by the neutrality provision of the Indiana Constitution.⁵³ Accordingly, allowing the professor to continue reading in the classroom where he possessed "the prestige, power and influence of school authority"⁵⁴ would have violated the

⁴⁵*Id.* at 905.

⁴⁶*Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)). Such regulation is typically known as a reasonable time, place, and manner requirement.

⁴⁷378 N.E.2d at 925. *See, e.g., Engel v. Vitale*, 370 U.S. 421 (1962).

⁴⁸378 N.E.2d at 905. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Indiana Court of Appeals, in effect, applied a high level of review in examining the propriety of the professor's practice of reading the Bible in the classroom.

⁴⁹378 N.E.2d at 905.

⁵⁰*Id.*

⁵¹*Id.* at 908.

⁵²U.S. CONST. amend. I. The first amendment states: "Congress shall make no law respecting an establishment of religion." *Id.*

⁵³IND. CONST. art. 1, § 4. Section 4 provides: "No preference shall be given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent." *Id.*

⁵⁴378 N.E.2d at 908. The court did not discharge Lynch because of his religious beliefs; Lynch's discharge resulted from his Bible reading activities.

principle of religious neutrality. The court also held that the professor's conduct disrupted the state's secular interest in teaching mathematics.⁵⁵

3. *State Action v. Private Action*.—Due process violations under the fourteenth amendment require a finding that the challenged wrongdoing constitutes a state action.⁵⁶ In *Renforth v. Fayette Memorial Hospital Association*,⁵⁷ the Indiana Court of Appeals held that a hospital rule requiring its physicians to retain liability insurance was not a state action and therefore was not subject to the due process clause of the fourteenth amendment.⁵⁸

The claim arose after the plaintiff Dr. Renforth was dismissed from the Fayette Memorial Hospital medical staff for failure to acquire professional liability insurance coverage as required by hospital bylaws. The doctor filed suit for legal and equitable relief against the private hospital as well as the board of trustees and executive committee of the hospital. The trial court entered judgment in favor of all the defendants.⁵⁹

On appeal, the plaintiff presented three arguments in support of his theory that the hospital had become a public institution so that its actions necessarily constituted state action under the due process clause. First, the plaintiff noted that acceptance of government funds subjected the hospital to governmental regulation. In support, the plaintiff offered summaries of governmental grants and programs in which the hospital participated. The court of appeals denied that such funding constituted state action,⁶⁰ relying on the Seventh Circuit Court of Appeals decision in *Doe v. Bellin Memorial Hospital*,⁶¹ which established that before state action can be found to dictate due process standards, a nexus must exist between the governmental involvement and the particular activity being challenged.⁶² Dr. Renforth failed to show any relationship between the governmental funds and the position taken by the hospital regarding professional liability insurance. The court also noted the lack of any evidence of interdependence between the hospital and any governmental bodies.⁶³

⁵⁵*Id.* at 905-06.

⁵⁶*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The due process clause of the fourteenth amendment provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

⁵⁷383 N.E.2d 368 (Ind. Ct. App. 1978).

⁵⁸*Id.* at 375.

⁵⁹*Id.* at 370.

⁶⁰*Id.* at 375.

⁶¹479 F.2d 756 (7th Cir. 1973).

⁶²*Id.* at 761.

⁶³383 N.E.2d at 373. In *Burton v. Wilmington Parking Auth.* 365 U.S. 715 (1961), the Supreme Court held that state action exists when the state "has so far insinuated itself into a position of interdependence" with a private institution that the state has become "a joint participant in the challenged activity." *Id.* at 725.

Second, the plaintiff contended that the composition of the hospital board of trustees, three of whom were elected from governmental bodies, converted the private hospital into a public institution.⁶⁴ The court summarily dismissed this claim, observing that the three members elected by governmental bodies were not necessarily governmental officials and citing testimony indicating that the three members had acted independently from the governmental bodies which had elected them.⁶⁵

Finally, the doctor argued that the hospital was a public institution because it enjoyed a monopoly position while performing a public function. The "public function" theory proposes that the acts of a private institution may be denominated state action when a private institution performs a function traditionally done by the state.⁶⁶ The court of appeals rejected the plaintiff's final argument as well, for failure to show a nexus between the purported governmental function performed by the hospital and the insurance requirement.⁶⁷

B. Federal Decisions

1. *Constitutionality of Attorney General's Refusal To Approve Contracts.*—The United States District Court for the Southern District of Indiana decided in *Citizens Energy Coalition v. Sendak*⁶⁸ that the attorney general's refusal to approve contracts or subgrants for financial assistance between the state public counselor and consumer groups violated the consumer groups' first amendment right to petition as well as their fourteenth amendment right to equal protection under the laws.⁶⁹

The principal plaintiffs in this action were the Citizens Energy Coalition, Inc., a private, nonprofit group representing residential utility ratepayers, and Indiana Public Inter-Research Group, a

⁶⁴383 N.E.2d at 374. The hospital association provided the following rule for electing trustees:

The Board of Trustees shall consist of seventeen (17) members. One (1) member shall be elected by the County Council of Fayette County; and one (1) member shall be elected by the Board of Commissions [sic] of Fayette County; one (1) member shall be elected by the Common Council of the City of Connersville, Indiana; two (2) members shall be medical doctors elected by the active medical staff of the Fayette Memorial Hospital; and twelve members shall be elected by the Council of the Association.

Id.

⁶⁵*Id.*

⁶⁶*Id.* (citing *Barrett v. United Hosp.*, 376 F. Supp. 792, 799, *aff'd*, 506 F.2d 1395 (2d Cir. 1974)).

⁶⁷383 N.E.2d at 375.

⁶⁸459 F. Supp. 248 (S.D. Ind. 1978), *aff'd*, 594 F.2d 1158 (7th Cir. 1979).

⁶⁹459 F. Supp. at 257-58.

private nonprofit organization promoting consumer and environmental projects. The plaintiff organizations complained that the attorney general refused to approve their contracts and subgrants because of their lobbying activities in the Indiana General Assembly. The plaintiffs sought injunctive as well as monetary relief.

Although recognizing that the attorney general had the discretion to refuse contracts that have unlawful form or content,⁷⁰ the district court rejected the attorney general's argument that the contracts involving the plaintiff organizations violated the Indiana provision prohibiting public officials from lobbying.⁷¹ The court stated that the attorney general cannot apply an otherwise valid provision so as to deprive an individual of his liberties.⁷² Finding that the attorney general's policy discriminated between groups who exercised their right to petition government by lobbying and those who do not,⁷³ the court held that the attorney general's action inhibited the constitutional right to petition government.⁷⁴ The court observed: "Persons in organizations such as Plaintiffs' are confronted with a dilemma: forsaking lobbying or giving up the right to seek contracts or subgrants from the State of Indiana."⁷⁵ The court thus applied a high level of judicial review,⁷⁶ requiring that the state demonstrate a compelling state interest as well as a narrowly tailored remedy to achieve that interest. The court determined that "Indiana's interest of assuring disinterested public administration and avoiding an appearance of impropriety . . . [could] be promoted by policies less

⁷⁰IND. CODE § 4-13-2-14 (1976). In response to the attorney general's refusal to approve state contracts and leases, the Indiana General Assembly in 1979 passed legislation prohibiting the attorney general from delaying action on contracts. Act of Apr. 10, 1979, Pub. L. No. 23, § 1, 1979 Ind. Acts 114 (codified at IND. CODE § 4-13-2-14 (Supp. 1979)). See *Indianapolis Star*, Apr. 5, 1979, at 4, col. 3. The new legislation requires the attorney general to provide written reasons why any contract violates legal requirements. IND. CODE § 4-13-2-14 (Supp. 1979). The attorney general has the obligation under the act to submit a status report concerning a submitted contract within 45 days after submission of the contract. *Id.* In addition, the statute provides that if the attorney general fails to disapprove a contract within 90 days after submission, the contract is automatically approved. *Id.*

⁷¹459 F. Supp. at 258. IND. CODE § 2-4-3-7(a) (Supp. 1979) states:

It is unlawful for any public official of this state, or of any county, township, city or town, including elective and appointive officers and employees, or any officer, member or employee of any state central committee of any party, to receive any compensation to appear before the General Assembly of the state of Indiana, or before either house or any committees of the General Assembly.

Id.

⁷²459 F. Supp. at 258.

⁷³*Id.*

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶*Id.* (citing *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976)).

restrictive of the right to petition government."⁷⁷ The grant by the district court of a preliminary injunction requiring the attorney general to execute the funding contracts was upheld on appeal to the court of appeals,⁷⁸ which quoted with approval the constitutional rationale of the lower court.⁷⁹

2. *Freedom of Expression and Religion*.—The rights of religious sects and groups to freely express their beliefs by seeking converts, distributing literature, and soliciting donations in public places received added protection in *International Society for Krishna Consciousness v. Bowen*.⁸⁰ An action against the state by the International Society for Krishna Consciousness and one of its members challenged the constitutionality of an Indiana State Fair Board regulation limiting the plaintiffs' activities to a few booths on the fairgrounds.⁸¹

The court found that the plaintiffs' distribution of religious materials and flowers, as well as their solicitation of donations, constituted expression within the protection of the first amendment.⁸² The court especially noted that the commercial character of solicitations does not limit their first amendment protection.⁸³ The court relied on a Supreme Court decision recognizing that religious groups cannot survive without financial backing and that freedom of religion, like freedom of the press and freedom of speech, belongs to everyone regardless of the ability to finance activities without donations or solicitations.⁸⁴

Because free speech and free exercise of religion involve fundamental rights, the court applied strict scrutiny review in holding that any specific restrictions of the first amendment rights must serve a compelling governmental interest and that the least restric-

⁷⁷459 F. Supp. at 258. The court reasoned that the attorney general's refusal to approve contracts was neither narrowly tailored nor rationally related to the state's interest in guaranteeing that state employees serve the public interest. *Id.* The court expressed the added reservation that this state interest did not outweigh the consumer groups' right to petition. *Id.*

⁷⁸394 F.2d 1158 (7th Cir. 1979).

⁷⁹*Id.* at 1162.

⁸⁰456 F. Supp. 437 (S.D. Ind. 1978).

⁸¹The court stated that the plaintiffs had standing to bring the action on the grounds that the restrictive fair rules posed a danger to their first amendment freedom and that the fairgrounds constituted a public forum where first amendment protection was necessary. *Id.* at 441-43. The court also found that the State Fair Board's policy of limiting religious solicitation constituted state action under the fourteenth amendment, thereby permitting the court to examine the board's policy for first amendment violations. *Id.* at 441.

⁸²*Id.* at 441.

⁸³*Id.*

⁸⁴*Id.* (citing *Murdock v. Pennsylvania*, 317 U.S. 105, 111 (1943)).

tive alternative must be chosen in meeting that interest.⁸⁵ The court found that the state's interest in eliminating inconvenience, discomfort, and litter produced by the religious group activities was not compelling enough to outweigh the plaintiffs' first amendment rights,⁸⁶ and that the restrictions in any case were overbroad.⁸⁷

The court also found that the fair board's rejection of the plaintiffs' request to use the fairgrounds constituted a prior restraint because it violated procedural safeguards:

[F]irst, the burden of instituting judicial proceedings and of proving that the material or conduct is unprotected must rest on the censor or licensor; second, any restraint prior to judicial review can be imposed only for specific brief periods and only for the purpose of preserving the status quo, and third, a prompt final judicial determination must be assured.⁸⁸

For the foregoing reasons, the court granted summary judgment for the plaintiffs, enjoining the defendants from interfering with the plaintiffs' first amendment activity on the fairgrounds so long as the plaintiffs restricted their activities to normal hours of operation of the Indiana State Fair.⁸⁹

3. *Constitutionality of Indiana's Medical Malpractice Act.*— During the 1970s, Indiana and a number of other states enacted legislation designed to limit the increase in malpractice litigation and the extent of liability in such litigation.⁹⁰ The Indiana Malpractice Act⁹¹ requires that all medical malpractice claims against a qualified medical health care provider⁹² be submitted to a medical

⁸⁵456 F. Supp. at 443. The court decided that the board's policy was "unconstitutional on its face and as applied to the plaintiffs insofar as it restricts their right to free exercise of their religion." *Id.*

⁸⁶*Id.* at 444. *But see* International Soc'y for Krishna Consciousness, Inc. v. Evans, 440 F. Supp. 414 (S.D. Ohio 1977) (similar state fair regulation limiting religious group activities to certain areas upheld in order to balance competing interests of free speech, free and orderly flow of traffic, and free access to communicated material).

⁸⁷456 F. Supp. at 444.

⁸⁸*Id.* at 443-44 (citing *Freedman v. Maryland*, 380 U.S. 51 (1965)).

⁸⁹456 F. Supp. at 444-45.

⁹⁰*See* Brennan, *Torts, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 340, 358 (1975); Note, *The Indiana Medical Malpractice Act: Legislative Surgery on Patients' Rights*, 10 VAL. U.L. REV. 303, 303 (1976).

⁹¹IND. CODE §§ 16-9.5-1-1 to -9-10 (1976 & Supp. 1979).

⁹²The act defines health care provider as follows:

[A] person, partnership, corporation, professional corporation, facility or institution licensed or legally authorized by this state to provide health care or professional services as a physician, psychiatric hospital, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, or psychologist, or an officer, employee or agent thereof acting in the course and scope of his employment.

Id. § 16-9.5-1-1(a) (Supp. 1979). A health care provider is qualified under the Act when

review panel, which will offer an expert opinion concerning liability.⁹³ After the medical review panel renders an opinion, the parties have the option of reaching a settlement on the basis of that opinion or launching a civil action.⁹⁴

The United States District Court for the Northern District of Indiana decided, in *Hines v. Elkhart General Hospital*,⁹⁵ that the Indiana Malpractice Act does not violate an individual's right to trial by jury, access to courts, due process, or equal protection under the law.⁹⁶ Although admitting sympathy for plaintiffs seeking compensation for malpractice, the court stated that legislative decisions involving social, economic, and political policies deserve special deference because such issues are properly the domain of the legislature and not the court.⁹⁷

The plaintiffs in *Hines* alleged that the medical review panel established by the Act unconstitutionally requires a plaintiff to satisfy an increased burden of proof at trial⁹⁸ and infringes as well upon a plaintiff's right to have the issue of damages established solely by a jury,⁹⁹ thus violating an individual's right to trial by jury.¹⁰⁰ The court observed that the legislature has the authority to alter common law rights, including trial by jury,¹⁰¹ and that federal and state appellate courts have found "reasonable changes in procedures surrounding the trial by jury . . . constitutionally permissible."¹⁰² The court distinguished its case from cases in other jurisdictions which have found a medical malpractice act unconstitutional because of its elimination of the right to trial by jury.¹⁰³ Preliminary hearings such

he or his insurance carrier files proof of financial responsibility with the state insurance commissioner and pays a surcharge charged by the act on all health care providers. *Id.* § 16-9.5-2-1.

⁹³*Id.* § 16-9.5-9-7 (1976).

⁹⁴*Id.* § 16-9.5-9-2.

⁹⁵465 F. Supp. 421 (N.D. Ind. 1979).

⁹⁶*Id.* at 426-34.

⁹⁷*Id.* at 434.

⁹⁸The plaintiffs alleged that admission of the medical review panel opinion would increase the plaintiffs' burden of proof because the plaintiffs might have to overcome the panel's opinion in convincing the jury of liability.

⁹⁹465 F. Supp. at 426.

¹⁰⁰*Id.*

¹⁰¹*Id.* at 426-27.

¹⁰²*Id.* at 427 (quoting *In re Peterson*, 253 U.S. 300, 309-11 (1920)).

¹⁰³*Id.* at 428-30. The court dismissed *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976), by noting that the Illinois malpractice statute is distinguishable in that Illinois allows the panel decision to be a final determination of the liability question whereas Indiana does not. 465 F. Supp. at 429. The court also dismissed *Simon v. St. Elizabeth Med. Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976), by observing that the Ohio case was decided by a trial judge and therefore may not be Ohio law. 465 F. Supp. at 428-29 (relying on *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977)). Moreover, the court rejected *Arneson v. Olson*, 208 N.W.2d 125 (N.D. 1978), on the grounds that the North Dakota act is distinguishable from In-

as that provided by the Indiana Medical Malpractice Act do not eliminate the jury role in deciding facts, but merely provide prima facie evidence for jury consideration.¹⁰⁴ The court also recognized the current trend to treat the medical panel opinion as an expert opinion and to admit the opinion as an exception to the hearsay rule.¹⁰⁵

In dismissing the argument that trial by jury includes a right to have the jury alone decide damages, the court held that the Indiana Constitution does not give the jury the sole authority to determine damages.¹⁰⁶ *Hines* implies that a preliminary panel¹⁰⁷ is unconstitutional only when it totally deprives the jury of its responsibility for determining damages.¹⁰⁸

The plaintiff also argued that the Act created separate classes for health care providers who qualify for the review panel and those who do not,¹⁰⁹ resulting in a violation of equal protection.¹¹⁰ Because the case did not involve a fundamental right or suspect class, the court applied a low level of review. Equal protection in relation to economic and social legislation only requires that the classification

diana's in that the North Dakota act totally abolished the jury role in malpractice cases and was therefore unconstitutional. 465 F. Supp. at 430.

¹⁰⁴465 F. Supp. at 427 (citing *In re Peterson*, 253 U.S. at 309-11).

¹⁰⁵465 F. Supp. at 428 (citing *Comiskey v. Arlen*, 55 A.2d 304, 390 N.Y.S.2d 122 (1976)).

¹⁰⁶465 F. Supp. at 429-30. By way of support, the court noted that the trial court has the right to adjust the amount of damages awarded by a jury. *Id.* at 429.

¹⁰⁷Although the preliminary panel procedure does not violate an individual's right to trial by jury, the Medical Malpractice Act settlement procedures may infringe upon this right. IND. CODE § 16-9.5-4-3 (Supp. 1979) outlines the procedure for determining damages after the "health care provider or its insurer has agreed to settle its liability" and the claimant seeks damages in excess of the insurance policy limits of \$100,000 from the patient's compensation fund. According to the Act, the claimant must file a petition with the court and notify the other parties about the additional amount sought. *Id.* § 16-9.5-4-3(1), (2). If the health care provider or its insurer objects and files objections with the court, the court will set a hearing. *Id.* § 16-9.5-4-3(3), (4). The statute provides that if the insurance commissioner, health care provider, provider's insurer, and claimant "cannot agree" on the amount of damages to be provided by the patient's compensation fund after the health care provider or its insurer has paid \$100,000, the court will decide the amount of damages exceeding the \$100,000 limit after hearing any relevant evidence. *Id.* § 16-9.5-4-3(5). The procedure apparently precludes the parties from exercising their right to have a jury decide the issue of damages. The language of the act emphasizes that the matter will be decided by a court at a hearing. This procedure eliminates the role of the jury and violates the guarantee of trial by jury. U.S. CONST. amend. VII; IND. CONST. art. 1, § 20.

¹⁰⁸*Id.* at 430. The court cited *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978), which held the North Dakota malpractice act to be unconstitutional because it provided for the total abolition of the jury in malpractice cases. See note 102 *supra* and accompanying text.

¹⁰⁹465 F. Supp. at 430.

¹¹⁰*Id.* See U.S. CONST. amend. XIV, § 1; IND. CONST. art. 1, § 23.

be reasonably related to a valid governmental interest.¹¹¹ In this case, the court found that submission of malpractice claims to an administrative panel prior to a court suit reasonably achieves the legitimate state interest in reducing health care cost.¹¹²

A claim that the Act also violated the due process clause and the Indiana constitutional provision guaranteeing litigants the right of access to the courts,¹¹³ on the grounds that the costs and delays created by the medical review panel and the limitations on damages deprive litigants of their access to the courts, was rejected by the court. Applying the traditional low level of review, the court held that reasonable limitations on the right of access to courts is a permissible means of serving the state interest of promoting reduced health costs and limiting medical malpractice liability.¹¹⁴ The court observed in conclusion that ten other jurisdictions with similar malpractice acts have held them to be constitutional.¹¹⁵

4. *Indianapolis Desegregation Case.*—Within the survey period, two federal court decisions tackled many of the questions surrounding the desegregation of the Indianapolis Public Schools (I.P.S.).¹¹⁶ The protracted litigation illustrates the difficulty which federal courts have had in fashioning interdistrict remedies to cure *de jure* segregation.¹¹⁷

The current litigation¹¹⁸ arose from a 1976 Seventh Circuit Court

¹¹¹465 F. Supp. at 430.

¹¹²*Id.* at 431 (citing *Everett v. Goldman*, 359 So. 2d 1266 (La. 1978)).

¹¹³*Id.* at 432. See U.S. CONST. amend XIV, art. I, (due process); IND. CONST. art. 1, § 12 (access to courts).

¹¹⁴465 F. Supp. at 433.

¹¹⁵*Id.* at 434.

¹¹⁶*United States v. Board of School Comm'rs*, 573 F.2d 400 (7th Cir.), *on remand*, 456 F. Supp. 183 (S.D. Ind. 1978).

¹¹⁷The United States Supreme Court, in *Milliken v. Bradley*, 418 U.S. 717 (1974), decided that "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Id.* at 744. The Court stated that an interdistrict remedy is only appropriate when it is "shown that racially discriminatory acts of the state or local school district, or of a single school district, have been a substantial cause of interdistrict segregation." *Id.* at 745.

¹¹⁸The Indianapolis desegregation case has undergone several phases of litigation before the decisions issued during the survey period. The United States District Court for the Southern District of Indiana decided in *Indianapolis I* that the Indianapolis Public School District was guilty of *de jure* segregation. *United States v. Board of School Comm'rs*, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir. 1973), *cert. denied*, 413 U.S. 920 (1973). In affirming the district court decision, the court of appeals held that I.P.S. demonstrated purposeful discrimination in the gerrymandering of school attendance zones, in the segregation of faculty, in the use of optional attendance zones among the schools, and in school construction and placement. *United States v. Board of School Comm'rs*, 474 F.2d at 85-88.

On remand from the court of appeals, the district court in *Indianapolis II* began the task of fashioning a remedy. *United States v. Board of School Comm'rs*, 368 F.

of Appeals decision. The court decided that legislation enlarging the boundaries of the civil city of Indianapolis to include practically all of Marion County,¹¹⁹ Uni-Gov, while simultaneously repealing a law providing that school and city boundaries must be coterminous,¹²⁰ had an obvious racially segregative impact.¹²¹ The Seventh Circuit also ruled that action of the Housing Authority of Indianapolis in locating all of its public housing projects within the I.P.S. boundaries produced discriminatory effects,¹²² therefore affirming a district court order transferring black students from I.P.S. to various suburban schools.¹²³ However, the Supreme Court of the United States vacated the Seventh Circuit decision and remanded the case¹²⁴ for further consideration in light of two Supreme Court cases requiring "proof of racially discriminatory intent or purpose" before an interdistrict remedy is enforced.¹²⁵

On remand, the Seventh Circuit Court of Appeals during this survey period reconsidered the Indianapolis case in light of the

Supp. 1191 (S.D. Ind. 1973), *rev'd*, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975). The district court ruled that the state had the duty to design an interdistrict, multi-county remedy. 368 F. Supp. at 1205. As a temporary measure, the court also ordered I.P.S. to reassign students to ensure that each elementary school had 15% blacks. *Id.* at 1209.

The district court in *Indianapolis III*, *id.* at 1223 (a supplemental memorandum of decision in *Indianapolis II*), issued an opinion suggesting a plan for desegregation of the schools. *Id.* On appeal, the Seventh Circuit Court of Appeals affirmed the district court holding that the state had the duty to desegregate I.P.S. but reversed the lower court's ruling that an interdistrict remedy must include school districts outside Uni-Gov boundaries. *United States v. Board of School Comm'rs*, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975). On remand, the district court held in *Indianapolis IV* that evidence supported an interdistrict remedy within Uni-Gov boundaries. *United States v. Board of School Comm'rs*, 419 F. Supp. 180 (S.D. Ind. 1975). The district court also enjoined the Indianapolis housing authority from building any more public housing within the I.P.S. boundaries. *Id.* at 186. Although the court of appeals affirmed this decision, the Supreme Court subsequently vacated the Seventh Circuit holding. *United States v. Board of School Comm'rs*, 541 F.2d 1211 (7th Cir. 1976), *cert. granted, vacated sub nom.* *Metropolitan School Dist. v. Buckley*, 429 U.S. 1068 (1977). During this survey period, the Seventh Circuit Court of Appeals and the District Court for the Southern District of Indiana have issued new opinions in light of the Supreme Court holding. The survey article focuses on the most recent Seventh Circuit and Southern District opinions.

¹¹⁹Act of Mar. 13, 1969, ch. 173, 1969 Ind. Acts 357 (codified at IND. CODE §§ 18-4-1-1 to -24-25 (1976 & Supp. 1979)).

¹²⁰Act of Feb. 25, 1969, ch. 52, § 153, 1969 Ind. Acts 57 (codified at IND. CODE § 20-3-14-11 (1976)).

¹²¹*United States v. Board of School Comm'rs*, 541 F.2d 1211, 1221 (7th Cir. 1976).

¹²²*Id.* at 1223.

¹²³*Id.* at 1224.

¹²⁴*Metropolitan School Dist. v. Buckley*, 429 U.S. 1068, 1068-69 (1977).

¹²⁵*Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

Supreme Court action. Addressing the question whether the district court could issue an interdistrict remedy under its equity powers,¹²⁶ the Seventh Circuit concluded that such a remedy required two prerequisite findings: that intentional action by the state had "significant segregative interdistrict effects"¹²⁷ and that a racially discriminatory purpose motivated the state action.¹²⁸

In analyzing the first standard, the court of appeals found that the expansion of the Indianapolis civil city boundaries without a concomitant expansion of I.P.S. boundaries constituted state action which had a significant segregative interdistrict impact.¹²⁹ The court explained that before 1969 any expansion of Indianapolis automatically caused an extension of I.P.S.'s boundaries. Repeal of the law coordinating I.P.S. expansion to the city's expansion¹³⁰ constituted the requisite state action. Turning to the issue of segregative impact, the court said that legislation leaving I.P.S. boundaries unchanged while expanding city boundaries prevented I.P.S. from remedying segregation by voluntarily spreading black pupils throughout a larger area.¹³¹

In addition to finding discriminatory legislation, the court held that discriminatory housing practices constitute state action having a significant segregative impact.¹³² The case was remanded to the district court for a determination of which state housing practices caused segregative housing patterns.¹³³

Another issue to be determined on remand was whether the state action had a discriminatory purpose.¹³⁴ The court explained that discriminatory intent does not have to be a dominant purpose so long as it is a motivating factor.¹³⁵ Discriminatory purpose may be demonstrated by the disproportionate impact of the state action if the impact is severe.¹³⁶ Discriminatory purpose may also be inferred from other factors, including:

- (1) the historical background of the decision, particularly

¹²⁶573 F.2d at 404.

¹²⁷*Id.* at 405 (citing *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974)).

¹²⁸573 F.2d at 404. This is the requirement imposed by *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976). See notes 134-37 *infra* and accompanying text.

¹²⁹573 F.2d at 407.

¹³⁰Act of Feb. 25, 1969, ch. 52, 1969 Ind. Acts 57 (codified at IND. CODE § 20-3-14-11 (1976)).

¹³¹573 F.2d at 407.

¹³²*Id.* at 409.

¹³³*Id.* at 410.

¹³⁴*Id.*

¹³⁵*Id.* at 411 (citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. at 265-66).

¹³⁶573 F.2d at 411.

- if it reveals a series of official actions taken for invidious purposes;
- (2) the specific sequence of events leading up to the challenged decision;
 - (3) departures from the normal procedural sequence;
 - (4) substantive departures, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached; and
 - (5) the legislative or administrative history of a decision.¹³⁷

The court concluded that the district court must apply an objective test in determining whether the state action had a discriminatory intent. Nevertheless, segregative intent may be presumed if segregation is shown to be a "natural, probable, and foreseeable result" of the state action.¹³⁸

On remand, the district court first considered the issue of intent. Relying on the factors suggested by the court of appeals, the district court found that the historical background of the decision, the sequence of events leading to the enactment of Uni-Gov, and the significant departure from the traditional policy of keeping school districts coterminous with city boundaries demonstrated a discriminatory intent.¹³⁹

The court also found that the public housing agency's policy of confining public housing projects to I.P.S. territory constituted state action having a segregative impact.¹⁴⁰ Addressing the question whether discriminatory intent motivated such housing practices, the court decided that the housing practices created a presumption of segregative intent—because the natural, probable, and foreseeable effect of limiting public housing projects within the I.P.S. boundaries is "to increase or perpetuate public school segregation within I.P.S."¹⁴¹ On the basis of these findings, the district court ordered the transfer of black students from I.P.S. to various suburban schools within Marion County.¹⁴²

¹³⁷*Id.* at 412 (citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. at 267-68). These factors are not inclusive.

¹³⁸573 F.2d at 413 (citing *NAACP v. Lansing Bd. of Educ.*, 559 F.2d 1042, 1046-47 (6th Cir. 1977)).

¹³⁹456 F. Supp. at 186-88.

¹⁴⁰*Id.* at 189.

¹⁴¹*Id.*

¹⁴²Following the district court decision, the appellant Board of School Commissioners filed an appeal with the Seventh Circuit Court of Appeals. *United States v. Board of School Comm'rs*, Nos. 78-1800, 78-1871, 78-1996 to -2006, 78-2039, 79-1831 to -1838, 79-1874, & 79-1975 (7th Cir., filed 1979). On August 8, 1979, the Seventh Circuit granted the appellants' motion for a stay of enforcement of the district court decision. *Id.*

C. Conclusion

The constitutional decisions during the survey period offer some insight into the court's power in today's society. *Citizens Energy Coalition*, *International Society for Krishna Consciousness*, *Lynch*, and *Pentecostal House* demonstrate that courts will strictly scrutinize matters involving religion, free expression, and free petition while *Hines* illustrates that courts will defer to other branches when social, political, and economic issues are at stake. However, *Nixon* and the Indianapolis desegregation case indicate that judicial authority is less clear when courts adopt solutions to complex social problems. *Nixon* represents a tortured effort to declare pari-mutuel betting unconstitutional by relying on authority calling for liberal construction of constitutions. The Indianapolis desegregation case is a classic example of the problems of implementing *Brown v. Board of Education*¹⁴³ "with all deliberate speed."¹⁴⁴ Indeed, resistance to desegregation in Indianapolis illustrates the difficulties courts face in attempting to change social attitudes and practices quickly.

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¹⁴³347 U.S. 483 (1954).

¹⁴⁴*Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).

*The author extends his appreciation to Douglas Starkey for his assistance in preparing this discussion.

V. Contracts, Commercial Law, and Consumer Law

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A. Introduction

The following discussion reviews some of the most important developments during the past year in contracts, commercial, and related consumer law. Some of the developments which raise contract, commercial, or related consumer law problems may also raise questions concerning secured transactions or creditors' rights and may be discussed in the portion of the Survey devoted to those subjects.¹ No effort will be made to duplicate the analysis of statutes and cases considered in that part of the Survey.

B. Commercial Law

1. *Buyer's Monetary Recovery on Seller's Default.*—There has been some dispute in the past as to the appropriate measure of recovery when the buyer acquires substitute goods after the seller's default.² It has been argued that the buyer's measure of recovery should be limited to that provided under Uniform Commercial Code (U.C.C.) section 2-712,³ dealing with cover: the difference between the price of the substituted goods (cover price) and the contract price.⁴ It could be argued, however, that the right to recover the difference between the cover price and the contract price is a special right which a buyer may utilize only if he has taken the steps provided in U.C.C. section 2-712. On this reasoning, the buyer might be able to purchase a substitute but still rely on the potentially larger measure of recovery provided in section 2-713—the difference between the market price and the contract price.

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¹Townsend, *Secured Transactions and Creditors' Rights, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 369 (1980).

²See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 6-4, at 190-91 (1972).

³All sections hereafter cited to the U.C.C. are also found in IND. CODE title 26 (1976 & Supp. 1979).

⁴Professors White and Summers make this argument based upon one of the Official Comments to U.C.C. § 2-713. J. WHITE & R. SUMMERS, *supra* note 2, § 6-4, at 191. The comment states: "The present section [dealing with buyer's damages for non-delivery or repudiation] provides a remedy which is completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered." U.C.C. § 2-713, Official Comment 5.

In *Parker v. Rod Johnson Farm Service, Inc.*,⁵ the court of appeals may have provided some guidance on this question. In that case, Parker agreed to provide 5,000 bushels of soybeans to Rod Johnson Farm Service at a price of \$5.09 per bushel. In turn, Farm Service arranged to sell the soybeans at a price of \$5.26 per bushel. In the period when performance was required, Parker delivered only 498 bushels. As a result, Farm Service was forced to purchase other soybeans for more than \$5.09 per bushel in order to satisfy its contracts. Farm Service sued Parker and the trial court awarded damages, apparently without stating the specific method of computation. The court of appeals affirmed this judgment, noting that the *market price* for soybeans was high enough on the relevant dates to justify the award.⁶ The court also stated that the buyer "was entitled to the difference between the market price for soybeans *at the time it learned of the breach* and the contract price."⁷ This language suggests that the court approved the use of a measure of recovery under U.C.C. section 2-713 even though the buyer had purchased substitute goods.

It should be noted that this case may not have been a good vehicle for resolving the dispute over whether a buyer can choose between U.C.C. sections 2-712 and 2-713. The market price and cover price may have been identical in this case because it appeared that the buyer was purchasing soybeans in an established market with published price quotations. If that were the case, it would make less difference whether section 2-712 or 2-713 was the basis for recovery and the court's dicta using the language of section 2-713 would be of less significance. However, even in a market with published price quotations, sections 2-712 and 2-713 could produce different results. Section 2-712(1) requires that cover be made in good faith *without unreasonable delay*. In contrast, section 2-713(1) fixes the measure of damages at the market price *when the buyer learned of the breach*. Under the former provision, the time during which cover can be made may include dates other than the one on which the buyer learns of the breach. Thus, in a market in which prices are changing, these two formulae may produce different results.

⁵384 N.E.2d 1129 (Ind. Ct. App. 1979).

⁶*Id.* at 1132.

⁷*Id.* (emphasis added). A small body of literature is devoted to interpreting the italicized language, which has caused the courts considerable difficulty in the context of an anticipatory breach. See R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 149, at 454-57 (1970); J. WHITE & R. SUMMERS, *supra* note 2, § 6-7, at 197-202. For examples of cases construing the phrase, see *First National Bank of Chicago v. Jefferson Mortgage Co.*, 576 F.2d 479 (3d Cir. 1978) ("learned of the breach" equals "learned of the repudiation"); *Cargill, Inc. v. Stafford*, 553 F.2d 1222 (10th Cir. 1977) ("learned of the breach" equals "time for performance" if a good reason exists for not covering).

2. *Privity Requirement.*—The concept known as privity has played a significant role in the evolution of the buyer's right to recover for defects in goods purchased.⁸ Some courts have permitted the buyer to recover from his immediate seller, but not from remote sellers in the system by which the goods were distributed.⁹ This distinction has been explained on the ground that there is no privity between the buyer and a manufacturer or middleman; privity exists only between the buyer and the person from whom the buyer purchased.¹⁰

In recent years, courts have relaxed the privity bar by permitting buyers to recover against remote sellers for certain types of loss. If the defective goods caused personal injury or property damage, there will probably be no privity barrier and the buyer will be able to sue remote sellers.¹¹ If, however, the buyer's loss can be explained only in economic terms not associated with personal injury or property damage (loss of the bargain), some courts permit recovery only against those with whom the buyer had a contract, that is, those with whom he was in privity.¹² This distinction seems to be built on the assumption that there is an important difference between personal injury and property damage losses, on the one hand, and purely economic losses on the other. The courts apparently presume that the manufacturer can anticipate personal injury or property damage and thus should be held responsible for those losses. The situation is different, however, when the only injury to the buyer is one based on expectations created in the specific transaction in which the goods are acquired. A manufacturer may not be aware of or capable of anticipating specific expectations created in a remote sale of its goods; hence, the manufacturer should not be held liable for losses associated with disappointment of those expectations.

⁸See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 641-43 (4th ed. 1971).

⁹*Id.*

¹⁰*Id.*

¹¹See J. WHITE & R. SUMMERS, *supra* note 2, §§ 11-3 to -4.

¹²See *S.M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363 (9th Cir. 1978); *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781 (5th Cir. 1973); *Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp.*, 422 F.2d 1013 (9th Cir.), *cert. denied*, 400 U.S. 902 (1970); *Mead Corp. v. Allendale Mut. Ins. Co.*, 465 F. Supp. 355 (N.D. Ohio 1979) (under Ohio law, economic losses could be recovered on a theory of strict liability in tort, but not on a theory of negligence); *Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962 (D. Ariz. 1975), *aff'd*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977); *Iowa Elec. Light & Power Co. v. Allis-Chalmers Mfg. Co.*, 360 F. Supp. 25 (S.D. Iowa 1973); *Noel Transfer & Package Delivery Serv., Inc. v. General Motors Corp.*, 341 F. Supp. 968 (D. Minn. 1972); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) (Traynor, C.J.); *Price v. Gatlin*, 241 Or. 315, 405 P.2d 502 (1965); *Eli Lilly & Co. v. Casey*, 472 S.W.2d 598 (Tex. Ct. App. 1971). See J. WHITE & R. SUMMERS, *supra* note 2, § 11-5.

In *Richards v. Goerg Boat & Motors, Inc.*,¹³ the Indiana Court of Appeals embraced this distinction and concluded that there is a privity requirement if the buyer's only injury is economic.¹⁴ In that case, the plaintiff had purchased a houseboat which developed serious leaks in the hull. The buyer sued not only the dealer from whom the boat had been purchased, but also the manufacturer of the boat. In concluding that privity was necessary, the court stated that "when the cause of action arises out of economic loss related to the loss of the bargain or profits and consequential damages related thereto, the bargained for expectations of buyer and seller are relevant and privity between them is still required."¹⁵ The court added, however, that the reason for the privity requirement would be obviated if the remote seller had actually participated in the transaction.¹⁶ In that case, the remote party would be aware of the expectations created in the sale transaction and could be held to stand responsible for those reasonable expectations. Participation could consist of discussing the product with the consumer, providing a demonstration or inspection ride for the consumer, dealing directly with the consumer concerning problems and corrective measures, or making express warranties to the consumer. In *Richards*, the court found participation on the part of the manufacturer and held that lack of privity was no barrier to recovery.¹⁷

3. *Warranty Disclaimers.*—In *Richards*, the defendants attempted to avoid implied warranty liability on the basis that the sale was "as is."¹⁸ Under U.C.C. section 2-316(3)(a),¹⁹ a sale "as is" excludes warranties of merchantability and fitness for a particular purpose. As proof of the fact that the sale was "as is," the defendants offered a written "description or proposition" which was one of the documents exchanged in the course of negotiating for the boat. The document contained the following language: "The boat has a one year warranty on the hull and the warranty on the engine is still good. It has hand operated marine heads and we will sell as is."²⁰ Presumably on the basis of this language in the document, the trial court decided that the sale was "as is" and granted summary judgment for the defendants.²¹ The court of appeals reversed on this issue for two reasons. First, U.C.C. section 2-316(2)²² requires that

¹³384 N.E.2d 1084 (Ind. Ct. App. 1979).

¹⁴*Id.* at 1092.

¹⁵*Id.* (citation omitted).

¹⁶384 N.E.2d at 1092.

¹⁷*Id.*

¹⁸*Id.* at 1093.

¹⁹See IND. CODE § 26-1-2-316(3)(a) (1976).

²⁰384 N.E.2d at 1094.

²¹*Id.* at 1090.

²²IND. CODE § 26-1-2-316(2) (1976).

language of disclaimer in a writing be conspicuous in order to exclude warranties.²³ The language quoted above was not conspicuous.²⁴ Second, the expression "as is" pertained solely to the marine heads and not to the general condition of the boat.²⁵

On remand in this case, the trial court's treatment of the above-quoted document will affect the decision whether the sale was "as is." It should be clear that the seller may not prove by way of the document alone that the sale was "as is" because the language in the document is not conspicuous and because it may not refer to anything more than the marine heads. Nevertheless, the seller should probably be able to offer other evidence, including parol evidence, tending to establish that the transaction was understood to be "as is" and without an implied warranty of merchantability.²⁶ No parol evidence rule problem would seem to be presented because the seller would not be attempting to contradict a term in the writing; he would simply be trying to show the surrounding circumstances to prove that the buyer understood the language in the document, and that it was not intended to cover only marine heads. The same problem may arise with respect to the implied warranty of fitness for a particular purpose, although there may be an additional complication on remand: section 2-316 requires that any disclaimer of the warranty of fitness be in writing.²⁷ It could be argued that this writing requirement affects the extent to which a writing, not sufficient in itself, can be explained or shown to be the basis on which the parties bargained.

4. *Battle of the Forms*.—One of the best-known U.C.C. provisions is section 2-207²⁸—the drafters' treatment of the historic "battle of the forms." In *Uniroyal, Inc. v. Chambers Gasket & Manufacturing Co.*,²⁹ the Indiana Court of Appeals had occasion to decide a case involving the "battle of the forms" and, in the process, made a

²³384 N.E.2d at 1094. Some jurisdictions, including Indiana, have held that the conspicuousness requirement applies not only to the use of the word "merchantability," but also to the use of expressions such as "as is." In other words, language must be conspicuous whenever the seller attempts to show that warranties have been disclaimed by means of the writing alone. See, e.g., *Osborne v. Genevie*, 289 So. 2d 21 (Fla. Dist. Ct. App. 1974); *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 286 N.E.2d 188 (1972); *Fairchild Indus. v. Maritime Air Serv., Ltd.*, 274 Md. 181, 333 A.2d 313 (1975); *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 268 A.2d 345 (1970).

²⁴The Indiana definition of "conspicuous" is found in IND. CODE § 26-1-1-201(10) (1976).

²⁵384 N.E.2d at 1094.

²⁶See *Smith v. Sharpensteen*, 521 P.2d 394 (Okla. 1974).

²⁷U.C.C. § 2-316(2). See IND. CODE § 26-1-2-316(2) (1976).

²⁸See IND. CODE § 26-1-2-207 (1976).

²⁹380 N.E.2d 571 (Ind. Ct. App. 1978).

significant contribution to the literature on the subject. In *Uniroyal*, the buyer, Chambers, sent an order form to the seller, Uniroyal, to arrange for the purchase of material used in fabricating gaskets. Uniroyal responded with an "order acknowledgement," apparently a preprinted form, which contained the following statement:

WE ACKNOWLEDGE AND THANK YOU FOR YOUR ORDER. OUR ACCEPTANCE OF THE ORDER IS CONDITIONAL ON THE BUYER'S ACCEPTANCE OF THE CONDITIONS OF SALE PRINTED ON THE REVERSE SIDE HEREOF. IF BUYER DOES NOT ACCEPT THESE CONDITIONS OF SALE, HE SHALL NOTIFY SELLER IN WRITING WITHIN SEVEN (7) DAYS AFTER RECEIPT OF THIS ACKNOWLEDGEMENT.³⁰

Various "conditions of sale" were printed on the reverse side of the acknowledgement form, including disclaimers of warranty³¹ and limitations of remedy.³² Chambers did not object to any of these printed terms on the acknowledgement form. To the contrary, Uniroyal delivered goods pursuant to this arrangement, and Chambers accepted them. When defects in the goods were discovered, Chambers sued Uniroyal claiming that the defects constituted breach of warranty. Among other things, Uniroyal argued that the terms on the acknowledgement form excluded warranties and limited remedies. Curiously, the trial court enforced some of the "conditions of sale" but concluded that others were not enforceable.³³

The court of appeals reversed the trial judge's decision on the efficacy of these "conditions of sale" on the following reasoning. The original order form was an offer,³⁴ but Uniroyal's acknowledgement form did not operate as an acceptance because the form expressly conditioned acceptance on Chambers' assent to the "conditions of sale"—terms which would have changed the contract contemplated by Chambers' order form in substantial ways. Thus, no contract was created at the time these forms were exchanged. Furthermore, Chambers' acceptance of the goods did not constitute assent to the conditions of sale. In reaching this conclusion, the court of appeals rejected what has been called the "last shot" principle³⁵ under which

³⁰*Id.* at 573.

³¹*See* IND. CODE § 26-1-2-316 (1976).

³²*See id.* § 26-1-2-719.

³³380 N.E.2d at 577.

³⁴Despite the trial court's finding that Chambers' offer expressly limited acceptance to the terms of the offer, the court of appeals found that Chambers' purchase order form included only terms of price, quantity, and shipment date. *Id.*

³⁵*Id.* at 578. The "last shot" principle requires that there be a fixed moment in

that party wins whose form was last sent prior to shipment of the goods. Instead, the court recognized that even though the documents exchanged between the parties did not create a contract, their conduct nonetheless could serve as a basis for enforcement of the contract between the parties.³⁶ In this case, delivery and acceptance of the goods made inescapable the conclusion that there was an agreement. According to section 2-207(3),³⁷ the terms of this contract implied by conduct were not fixed by the form of either party, but were those terms upon which the exchanged documents agreed (usually the central or “dickered” terms such as quantity, price, and delivery times which are written on the forms by both buyer and seller) along with any supplementary terms provided by the “gap filler” provisions of the Code.³⁸ In *Uniroyal*, the forms of Chambers and Uniroyal did not agree on matters which the trial judge apparently concluded were governed by Uniroyal’s form. Thus, the trial judge erred in imposing those terms.

One interesting aspect of the *Uniroyal* case involves the preemptive effect of the conditional language in Uniroyal’s acknowledgement form. The question is whether a form containing such language of condition could ever serve as a definite and seasonable expression of acceptance and cause the parties to be bound when sent. It could be that, despite its conditional language, the seller’s acknowledgement form in *Uniroyal* actually may have been intended as an expression of acceptance. Such a possibility would be heightened if the parties had engaged in similar transactions over a period of time using the same form—something which appears to have existed in *Uniroyal*.³⁹ This sequence of conduct could indicate a course of dealing⁴⁰ between the parties which would demonstrate their intention to attach no significance to the language on the seller’s printed form. This might have been the case if

time when a contract comes into existence. Thus, the last document exchanged between the parties is treated as the offer, and the receipt of the goods is treated as the acceptance. Hence the expression “last shot,” because the party who “fired the last shot,” that is, sent the last document, will be the victor of the “battle of the forms.” For an application of the principle, see *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962).

³⁶380 N.E.2d at 578. See IND. CODE § 26-1-2-207(1) (1976).

³⁷IND. CODE § 26-1-2-207(3) (1976).

³⁸380 N.E.2d at 578. “Gap fillers” are those terms which are supplied by U.C.C. guidelines and the courts in the absence of agreement between the parties. The expression seems to have been coined by Professors White and Summers. See J. WHITE & R. SUMMERS, *supra* note 2, §§ 3-4 to -8. The gap filler provisions include standards for use by the courts when the parties fail to agree on time of delivery, U.C.C. § 2-309; place of delivery, *id.* § 2-308; price, *id.* § 2-305; and the implied warranty of merchantability, *id.* § 2-314.

³⁹380 N.E.2d at 574.

⁴⁰See IND. CODE § 26-1-1-205(1) (1976).

Uniroyal had consistently accepted responsibility for defects which the acknowledgement form excluded from the scope of its responsibilities. In *Uniroyal*, the court seemed to conclude as a matter of law that the acknowledgement form could not operate as an acceptance and did not seem to leave any room on remand for the trial court to consider these possibilities. Thus, it may be that draftsmen will be able to rely on this type of printed language in an acknowledgement form in all cases to prevent a contract from being formed at the time that the documents are exchanged. Although this result has the salutary effect of preventing one party from winning the "battle of the forms," it may create problems when a buyer chooses not to go through with a contract after the exchange of documents but before delivery of the goods.⁴¹

5. *Vouching In*.—U.C.C. section 2-607(5) provides a "vouching in" procedure—a method by which an aggrieved buyer can exert pressure on his seller to defend an action against the buyer based on some defect in the goods. For example, assume that *S* sold goods to *B*, who in turn sold the goods to *B2*. *B2* discovered defects in the goods and filed suit against *B* for breach of warranty. In this situation, *B* would want to be considered only a middleman; he would want responsibility for defending the condition of the goods to lie with *S*, the original seller. U.C.C. section 2-607(5)(a) gives *B* a right to notify *S* in writing that *B2* has filed suit for breach and to demand that *S* defend the action on penalty of being bound in any suit against him by *B* "by any determination of fact common to the two litigations."⁴²

In *Uniroyal*, Chambers resold the goods which Uniroyal had supplied to Thrush. Thrush, upon discovering defects in the goods, brought suit against Chambers for breach of warranties. Chambers gave notice to Uniroyal to come in and defend Thrush's suit.⁴³ At the same time, Chambers joined Uniroyal in the original action by Thrush. By agreement of the parties, the suit by Thrush against Chambers was tried first. The trial court made findings of fact and entered judgment in favor of Thrush. Thereafter, the trial judge granted a motion for summary judgment in favor of Chambers against Uniroyal.⁴⁴ On appeal, Uniroyal argued that summary judgment was improper because: (1) the "vouching in" procedure was not binding on a seller who had been impleaded, and (2) even if Uniroyal

⁴¹To the extent that draftsmen may avoid the effects of U.C.C. § 2-207(1) with printed language, a species of the mirror image principle survives—precisely the vice which the draftsmen of § 2-207 sought to eliminate.

⁴²U.C.C. § 2-607(5)(a).

⁴³380 N.E.2d at 574.

⁴⁴*Id.* at 579.

were bound by determinations of fact in the suit between Chambers and Thrush, there were issues of fact not litigated in that action.⁴⁵ The court of appeals dismissed the first argument, concluding that the “vouching in” procedure was effective notwithstanding Chambers’ use of impleader.⁴⁶ The fact that Uniroyal had been impleaded did not prevent it from taking over the defense in the original action by Thrush against Chambers. The court held, however, that a genuine issue of fact rendered summary judgment inappropriate.⁴⁷ Even though some issues of fact had been determined in the suit by Thrush against Chambers, the issue whether the condition of the goods had changed after delivery to Thrush remained for disposition. Because the trial judge had made no finding on that question, summary judgment was inappropriate.⁴⁸

The court’s decision makes it clear that when the original seller is “vouched in,” the consequence of his failure to accept responsibility for defense of the initial suit will not be an automatic entry of judgment in a suit by his buyer. The buyer will still have to establish at least that (1) *B* purchased the goods from *S*, (2) *B* sold the goods to *B2* subject to the warranties made by *S*, (3) *B2* “was able to obtain a judgment against” *B*,⁴⁹ (4) *B* properly “vouched in” *S*, (5) *S* declined to assume the defense, (6) *B* paid the judgment to *B2*, and (7) no change occurred in the condition of the goods. The seller may raise a number of defenses in this type of litigation. For example, he may argue that (1) *B* did not purchase the goods from *S*, (2) no warranties were made by *S* to *B* or remedies were limited by agreement, (3) *B* failed to give proper notice of breach of warranty, (4) no loss was suffered by *B*, or (5) the condition of the goods changed after delivery to *B* by *S*.

6. *Properly Payable Checks*.—Important rights can hinge on whether a check is properly payable. If a check is properly payable, the bank on which it is drawn will be able to charge it against the customer’s account.⁵⁰ This is true even though that charge creates an overdraft in the customer’s account.⁵¹ If, on the other hand, a check is not properly payable, any payment made by the bank will not concern the customer and should not result in a charge against the customer’s account. For example, a check bearing a forged payee’s endorsement probably would not be properly payable and

⁴⁵*Id.*

⁴⁶*Id.* at 580-81.

⁴⁷*Id.* at 581-82.

⁴⁸*Id.*

⁴⁹*Id.* at 580.

⁵⁰U.C.C. § 4-401(1).

⁵¹*Id.*

the payor bank would not be entitled to charge the customer's account in the amount of the check.⁵²

In *Lincoln National Bank & Trust Co. v. Peoples Trust Bank*,⁵³ the Indiana Court of Appeals addressed an interesting problem concerning whether a check was properly payable. On December 3, Wyss drew a check on his account with the Lincoln Bank payable to Rudisill Motors. Wyss delivered the check to Allan, who was apparently the principal officer and owner of Rudisill Motors. Sometime before December 3, Wyss' attorney had notified an officer of the Lincoln Bank that Wyss was not mentally sound and that the bank should not honor any checks of Wyss. On December 3, Allan attempted to cash the check at a branch office of Lincoln Bank, but the bank dishonored it, apparently because the account on which it was drawn did not have sufficient funds. After banking hours, Allan presented the check to a BankAmericard teller at Lincoln Bank's main office and endorsed the check, apparently as principal officer of Rudisill. The teller accepted the check, credited part of the amount to Allan's BankAmericard account, and issued a cashier's check made payable to Allan for the balance. The check created a substantial overdraft in the account of the drawer, Wyss. Wyss died less than two months later and Lincoln Bank set off the amount of the overdraft against other funds Wyss had on deposit. Wyss' estate sued Lincoln Bank, claiming that Wyss' check was not properly payable and that Lincoln Bank had no right to effect a set-off against Wyss' other account. The trial court agreed with the estate and entered judgment against Lincoln Bank in the amount of the check.⁵⁴

The court of appeals reversed on this issue, concluding as a matter of law that the check was properly payable.⁵⁵ The court stated that the fact that the check resulted in an overdraft did not affect its status as a properly payable instrument.⁵⁶ The fact that Wyss' attorney had notified Lincoln Bank that Wyss was not mentally sound did not prevent Lincoln from paying the check. The bank's authority to pay would have been revoked only if the bank had known "of an adjudication of incompetence and [had] a reasonable opportunity to act on it."⁵⁷ In this case, Wyss was never adjudicated incompetent.

⁵²Whaley, *Forged Indorsements and the U.C.C.'s "Holder,"* 6 IND. L. REV. 45, 46 (1972).

⁵³379 N.E.2d 527 (Ind. Ct. App. 1978).

⁵⁴*Id.* at 529.

⁵⁵*Id.* at 530.

⁵⁶*Id.* at 529 (citing IND. CODE § 26-1-4-401 (1971) (current version at *id.* § 26-1-4-401 (1976))).

⁵⁷379 N.E.2d at 530 (quoting IND. CODE § 26-1-4-405 (1971) (current version at *id.* § 26-1-4-405 (1976))).

Wyss' lawyer's instruction not to pay the check did not amount to a stop payment order because there was no indication that the lawyer had acted on the drawer's instructions.⁵⁸ The fact that the check was paid in violation of an internal bank rule, which required managerial approval before a teller could cash or certify a check over \$500, was not relevant to the question whether the check was properly payable. The court refused to permit internal rules designed for bank protection to be invoked for the benefit of the drawer or his estate.⁵⁹ Similarly, the fact that the check had been dishonored earlier in the day did not affect its status as a properly payable instrument.⁶⁰ Finally, the court held that Lincoln Bank was not negligent in cashing Wyss' check with knowledge of his mental instability.⁶¹ Although the bank had been requested to "monitor" the drawer's account before presentment of the check, the duty to "monitor" did not generate a duty to dishonor checks which were otherwise properly payable.⁶²

The court of appeals did not seem to consider whether the trial court's decision could be justified on the ground that Lincoln Bank had acted in bad faith. Section 1-203 provides that "every contract or duty . . . imposes an obligation of good faith in its performance . . ."⁶³ As to banks, this obligation cannot be disclaimed by agreement.⁶⁴ Under circumstances slightly different from those at issue, U.C.C. section 4-404⁶⁵ specifies that a bank has the right to charge a customer's account only if the bank paid the item in good faith. This limitation operates even though the item is otherwise properly payable.

7. *Indorsers' Commitments.*—In *American National Bank & Trust Co. v. St. Joseph Valley Bank*,⁶⁶ the Indiana Court of Appeals dealt with an issue concerning the responsibility of indorsers on a check. The problem began when John and Nancy Augustine agreed to borrow money from the South Bend Federal Savings and Loan Association (South Bend) to pay Hanover Homes Corporation (Hanover) for the construction of a home on the Augustine's prop-

⁵⁸379 N.E.2d at 530 (citing IND. CODE § 26-1-4-403 (1971) (current version at *id.* § 26-1-4-403 (1976))). Section 4-403 provides that a "customer" may by order stop payment. It does not appear that the lawyer would have been a customer of the bank with respect to this check and account unless he were acting on the specific instructions of the drawer.

⁵⁹379 N.E.2d at 529-30.

⁶⁰*Id.* at 530.

⁶¹*Id.*

⁶²*Id.*

⁶³IND. CODE § 26-1-1-203 (1976).

⁶⁴*Id.* § 26-1-4-103(1).

⁶⁵*Id.* § 26-1-4-404(1).

⁶⁶389 N.E.2d 379 (Ind. Ct. App. 1979).

erty. South Bend paid the proceeds of the loan to the Augustines by three checks. The last of those checks was made payable to John Augustine, Nancy Augustine, and Hanover. Only John Augustine and Hanover indorsed the check, which was deposited in Hanover's account at the St. Joseph Valley Bank (St. Joseph). St. Joseph forwarded the check for collection and the American National Bank and Trust Company, the payor bank, paid the check. South Bend, upon discovering Nancy Augustine's failure to indorse the check, notified American, which reccredited South Bend's account in the amount of the check. American sued St. Joseph, which in turn impleaded John and Nancy Augustine, alleging liability on the basis of transfer commitments made in connection with the check. After a bench trial the court held in favor of St. Joseph in its third-party action against the Augustines. The court of appeals reversed, finding no basis in the record for recovery against either John or Nancy Augustine.⁶⁷

In reviewing the decision of the trial judge, the court of appeals rejected the claim that John Augustine had made an indorser's contract which ran in favor of St. Joseph.⁶⁸ John did indorse the check before its deposit. Nevertheless, the court of appeals, quoting Indiana Code section 26-1-3-414(1),⁶⁹ emphasized that an indorser's contract runs only in favor of a "holder."⁷⁰ That section states that the "indorser engages that upon dishonor . . . he will pay the instrument . . . to the holder or to any subsequent indorser who takes it up"⁷¹ The court observed that St. Joseph did not qualify as a holder because of the missing indorsement and thus could not recover on the indorser's contract made by John Augustine.⁷² In addition, the court noted that no dishonor occurs when a payor bank returns an instrument for lack of proper indorsement.⁷³ In the absence of dishonor, the indorser's contract liability is not activated.

The court's conclusion that the contract liability of an indorser extends only to holders seems to be based on a narrow reading of section 3-414. The draftsmen may have used the word "holder" in section 3-414(1) to describe generally the type of liability undertaken by an indorser rather than to specifically limit liability to those per-

⁶⁷*Id.* at 381.

⁶⁸*Id.* at 382.

⁶⁹IND. CODE § 26-1-3-414(1) (1976). *See* U.C.C. § 3-414(1).

⁷⁰389 N.E.2d at 382.

⁷¹IND. CODE § 26-1-3-414(1) (1976).

⁷²389 N.E.2d at 382. The court correctly pointed out that a check made payable to more than one payee cannot be negotiated save by endorsement of all parties. The transferee of an instrument cannot become a holder except through the process of negotiation. *Id.* (citing IND. CODE § 26-1-1-201(20), -3-116(b) (1976)). *See also* IND. CODE § 26-1-3-202.

⁷³389 N.E.2d at 382 (citing IND. CODE § 26-1-3-507 (1976)).

sons who qualify as holders. If an indorser's contract liability were to run only to those who qualified as holders, an indorser would incur no liability when an instrument proved to be, for technical reasons, non-negotiable.⁷⁴ Likewise, in a case of transfer of the instrument over a forged indorsement, the taker and all subsequent takers probably would not qualify as holders.⁷⁵ Furthermore, the indorser's liability under section 3-414(1) extends to any "subsequent indorser who takes it up."⁷⁶ The section does not appear to require that the subsequent indorser also be a holder. Thus, if St. Joseph could establish itself as a subsequent indorser it might be entitled to recover on the indorser's contract even under a narrow reading of section 3-414. St. Joseph's status as a subsequent indorser would seem to depend on whether St. Joseph had supplied an indorsement in the course of the collection process. The furnishing of an indorsement during collection is a somewhat accidental event and a tenuous basis for determining those entitled to sue on an indorser's contract. This observation further supports the view that the language of section 3-414 was not designed to limit liability to persons who qualify as holders.

One other feature of the case is worth noting. The trial court entered judgment against Nancy Augustine even though she had not signed the instrument as an indorser.⁷⁷ This decision may have been based on the assumption that Nancy was a transferor of the instrument. Nancy was one of the persons who planned to pay for the construction work with the loan proceeds represented by the check and, in this role, could be viewed as a transferor. If Nancy were a transferor, section 3-201(3) might have come into play. Under that section, the transferee has "a specifically enforceable right to have the unqualified indorsement of the transferor."⁷⁸ If Nancy were treated as having made the indorsement because of the specifically enforceable right, she would be obligated on an indorser's contract, negotiation would have taken place, and St. Joseph would qualify as a holder.

C. Consumer Law

1. *Home Solicitation Sales.*—The Indiana Uniform Consumer Credit Code⁷⁹ provides that in a home solicitation sale the buyer has the right to cancel the sales contract within what is usually referred

⁷⁴U.C.C. §§ 3-102(e), -104, -202.

⁷⁵See Whaley, *supra* note 52, at 58.

⁷⁶U.C.C. § 3-414(1).

⁷⁷389 N.E.2d at 381.

⁷⁸IND. CODE § 26-1-3-201(3) (1976).

⁷⁹*Id.* §§ 24-4.5-1-101 to -6-203 (1976 & Supp. 1979).

to as a three-day cooling off period.⁸⁰ A home solicitation sale is defined as "a consumer credit sale of goods, other than farm equipment, or services in which the seller or a person acting for him engages in a personal solicitation of the sale at a residence of the buyer and the buyer's agreement or offer to purchase is there given to the seller" ⁸¹

The 1979 session of the Indiana Legislature added two new dimensions to this definition of home solicitation sale. First, the definition of home solicitation sale has been amended to include "a personal solicitation of the sale, including a solicitation over the telephone, at a residence of the buyer" ⁸² Thus, the personal solicitation can be by telephone as well as by personal visit to the home. Second, the definition of home solicitation sale now encompasses a sale solicited "in a city . . . in which the seller does not have a permanent business establishment, through mailings, advertisements, or telephone calls, which require the buyer to meet the seller . . . at a place other than the seller's permanent business establishment." ⁸³ The second amendment covers the case of a company which sells its products by setting up a temporary place of business in a city in which the company has no permanent business establishment. For example, a Chicago company selling suits from Hong Kong might sell its wares through a salesman in a motel in Lebanon, Indiana. Such a sale would be a home solicitation sale, even though not in the buyer's home, and the buyer would have the benefit of the cooling off period.

2. *Electronic Fund Transfer Services.*—Electronic fund transfer services, which have been offered to the public more and more frequently in the recent past, are found in at least four different forms. First, there are automated tellers, or twenty-four hour bank tellers, which enable bank customers to engage in various banking transactions at a remote terminal. Computers rather than bank employees operate these twenty-four hour terminals. Second, there are systems which permit customers to transfer money between bank accounts or make payments from a bank account by telephone. For example, a customer might transfer money from a savings account into a checking account by telephone in order to cover a check she has written. Third, there are automatic payment and receipt mechanisms whereby payments can be made directly from the account of a customer to regular creditors or money paid

⁸⁰*Id.* § 24-4.5-2-502 (1976).

⁸¹*Id.* § 24-4.5-2-501.

⁸²Act of Apr. 9, 1979, Pub. L. No. 237, 1979 Ind. Acts 1132 (codified at IND. CODE § 24-4.5-2-501 (Supp. 1979)).

⁸³*Id.* at 1132-33 (codified at IND. CODE § 24-4.5-2-501 (Supp. 1979)).

for the account of a customer can be deposited directly into the customer's bank account. An example of a payment mechanism is found in those services by which utility bills or insurance premiums can be deducted automatically on a periodic basis from the customer's bank account. Finally, there are point-of-sale electronic transfers which involve a direct electronic deduction from the customer's account for the amount of the purchase. Thus, a discount house might make an electronic deduction from a customer's bank account at the time of purchase of a television set.

Although electronic terminal systems are relatively new, they have become quite popular. As of last year, there were 8,000 automated teller machines in operation in the United States, each of which averaged nearly 2,000 electronic fund transfers per month. Approximately 100 financial institutions offered pay-by-phone services and, in 1977, the Treasury Department electronically deposited over 60 million social security and elderly income maintenance payments.⁸⁴

Some persons concerned with electronic fund transfer services argued that enactment of regulatory laws at this time would be premature because the newly developed electronic fund transfer services have not yet taken on specific forms. They suggested that to initiate regulation now might inhibit development and improperly influence the type of services provided.⁸⁵ Congress ignored this reservation and on November 10, 1978, enacted the Electronic Fund Transfer Law (EFT).⁸⁶ EFT forms a new part of the Consumer Credit Protection Act (CCPA)⁸⁷ and deals in general with anticipated problems concerning electronic fund transfer.

In this brief review, no effort will be made to analyze each provision of the new law. What follows is only a summary of some of the more significant provisions.

a. Issuance of cards.—Problems created by distribution of unsolicited credit cards led Congress to enact section 132 of the CCPA.⁸⁸ This section prohibits issuance of a credit card except as a

⁸⁴SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, FAIR FUND TRANSFER ACT, S. REP. NO. 915, 95th Cong., 2d Sess. 2, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 9403, 9404.

⁸⁵*Id.* at 20-22, U.S. CODE CONG. & AD. NEWS 9421-23 (additional views of Messrs. Schmitt, Tower, Morgan, Garn, and Lugar).

⁸⁶15 U.S.C.A. §§ 1693-1693r (West Supp. 1979). Some parts of EFT became effective 90 days after enactment. Those provisions having to do with unauthorized transfer and restrictions on issuance of cards took effect on February 10, 1979. The remainder of the new law will not become effective until May 10, 1980.

⁸⁷15 U.S.C. §§ 1601-1692o (1976 & Supp. I 1977); 15 U.S.C.A. §§ 1601-1693r (West Supp. 1979).

⁸⁸15 U.S.C. § 1642 (1976).

renewal or in response to a request or application.⁸⁹ EFT operates on the same premise except that it provides one opportunity for financial institutions to avoid the general prohibition against unsolicited issuance and to promote the use of electronic fund transfer mechanisms. Under EFT, financial institutions may distribute, on an unsolicited basis, cards, codes, or other means of access for use in initiating electronic fund transfers upon fulfillment of certain conditions.⁹⁰ First, the card or other means of access must not be validated.⁹¹ This provision appears to require that the consumer make some additional request before the card or means of access can be used to initiate an electronic fund transfer. Second, the distribution must be accompanied by all the disclosures required under EFT.⁹² Third, the distribution must be accompanied by a clear explanation of how the customer may dispose of the card or other means of access if he does not choose to have it validated.⁹³ Finally, validation of the card or means of access is permitted only in response to a request from the consumer, upon confirmation of the consumer's identity.⁹⁴ According to the senate committee report, this provision on unsolicited distribution "is intended to permit financial institutions to develop a sufficient card base while also protecting a consumer's account from unauthorized access by a thief who has intercepted the consumer's mail."⁹⁵

b. Disclosure.—EFT requires disclosure, in accordance with regulations of the Federal Reserve Board, of the terms and conditions of electronic fund transfers.⁹⁶ Disclosures must be made in readily understandable language at the time the consumer contracts for an electronic fund transfer service⁹⁷ and may be made by model clauses published by the Board.⁹⁸ To the extent applicable to the transaction, the disclosures must include the following:⁹⁹ the con-

⁸⁹*Id.*

⁹⁰15 U.S.C.A. § 1693i(b) (West Supp. 1979) (effective February 10, 1979).

⁹¹*Id.* § 1693i(b)(1).

⁹²*Id.* § 1693i(b)(2).

⁹³*Id.* § 1693i(b)(3).

⁹⁴*Id.* § 1693i(b)(4).

⁹⁵SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, FAIR FUND TRANSFER ACT, S. REP. NO. 915, 95th Cong., 2d Sess. 16, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 9403, 9418.

⁹⁶15 U.S.C.A. § 1693c(a) (West Supp. 1979) (effective May 10, 1980).

⁹⁷*Id.*

⁹⁸*Id.* § 1693b(b) provides that "[t]he Board shall issue model clauses for optional use by financial institutions to facilitate compliance with the disclosure requirements"

⁹⁹The Board will be making final the regulations which will explicitly state all the necessary disclosures. No effort has been made to discuss the proposals now pending before the Board concerning these disclosures. *See* 44 Fed. Reg. 18,481 (1979).

sumer's potential liability for unauthorized use of a code, card, or other means of access;¹⁰⁰ the telephone number and address of the person to be contacted in case the consumer believes there has been an unauthorized use;¹⁰¹ the kinds of transfers which the consumer may initiate;¹⁰² the charges which can be made for transfers or the right to make transfers;¹⁰³ the consumer's right to stop payment of preauthorized transfers and the procedure to be followed in stopping payment;¹⁰⁴ the consumer's right to receive documentation of transfers;¹⁰⁵ a summary of the error resolution procedure;¹⁰⁶ the liability of financial institutions for unauthorized transfers;¹⁰⁷ and the circumstances under which the financial institution will disclose information about the consumer's account to third persons.¹⁰⁸ If a financial institution changes any term or condition of a consumer's account, it must give notice in writing at least twenty-one days prior to the effective date of the change. However, no such notice is necessary if the change in terms will not result in increased costs for the consumer or reduced access to the consumer's account.¹⁰⁹

c. *Documentation of transfers and periodic statements.*—EFT section 906¹¹⁰ provides that the financial institution must furnish written verification of transactions in at least three different situations. First, the financial institution must provide written documentation of any transfer initiated by a consumer at an electronic terminal at the time the transfer is initiated.¹¹¹ The documentation must specify the amount, date, and type of transaction; the location or identification of the terminal; the identity of the consumer's account to or from which a transfer was made; and the identity of any third party to or from whom a transfer was made.¹¹² This provision amounts to a requirement that a receipt be issued for every automated teller or point-of-sale transfer and furnishes the consumer with a reminder as well as a document for recordkeeping. Second, the financial institution must give notice to a consumer whose account is credited by a preauthorized electronic fund transfer from the same payor on a regular basis.¹¹³ The purpose of this notice is to

¹⁰⁰15 U.S.C.A. § 1693c(a)(1) (West Supp. 1979) (effective May 10, 1980).

¹⁰¹*Id.* § 1693c(a)(2).

¹⁰²*Id.* § 1693c(a)(3).

¹⁰³*Id.* § 1693c(a)(4).

¹⁰⁴*Id.* § 1693c(a)(5).

¹⁰⁵*Id.* § 1693c(a)(6).

¹⁰⁶*Id.* § 1693c(a)(7).

¹⁰⁷*Id.* § 1693c(a)(8).

¹⁰⁸*Id.* § 1693c(a)(9).

¹⁰⁹*Id.* § 1693c(b).

¹¹⁰*Id.* § 1693d.

¹¹¹*Id.* § 1693d(a).

¹¹²*Id.* § 1693d(a)(1)-(a)(5).

¹¹³*Id.* § 1693d(b).

inform the consumer that the funds are available for use. The financial institution may elect to provide positive notice to the consumer when the credit is made as scheduled, or negative notice when the credit is not made as scheduled. The financial institution must disclose the means of notice at the time the consumer enters into an electronic fund transfer agreement. Finally, financial institutions must provide periodic statements for any account which may be accessed by electronic fund transfer.¹¹⁴ These statements must be furnished every three months or more frequently to coincide with a "cycle," but in no case will they be required more often than monthly. The statements may include other information which is relevant to a consumer's account, but must specify: (1) all information required for a transaction initiated at an electronic terminal,¹¹⁵ (2) the amount of any charge imposed during the period for electronic fund transfers or account maintenance, (3) beginning and ending balances in the account, and (4) the address and telephone number to be used by the consumer in making inquiries or giving notice of error.¹¹⁶

This documentation serves a dual purpose. Not only does it facilitate consumer awareness and recordkeeping, but also it constitutes admissible evidence and prima facie proof of an electronic fund transfer to another person.¹¹⁷ For example, in proving payments deductible under the federal income tax laws, the documentation will serve as would a cancelled check.

d. Preauthorized transfers.—Some electronic fund transfers involve regular payments from a consumer's bank account. For example, a consumer might arrange to pay insurance premiums or utility bills by having amounts deducted directly from his bank account at regular intervals and transferred electronically to the insurance or utility company. EFT section 907¹¹⁸ states that authorization for this type of transfer must be given in writing by the consumer and that a copy of the authorization must be provided to the consumer when it is made.¹¹⁹ In addition, the consumer may stop payment of a preauthorized electronic transfer by giving the financial institution either oral or written notice at any time up to three business days before the scheduled payment date.¹²⁰ If the consumer provides oral notice to stop payment, the financial institution may require that the consumer furnish written confirmation within fourteen days of

¹¹⁴*Id.* § 1693d(c).

¹¹⁵*Id.* § 1693d(c)(1). The required information is described in *id.* § 1693d(a). See text accompanying notes 65-66 *supra*.

¹¹⁶15 U.S.C.A. § 1693d(c)(2)-(c)(4) (West Supp. 1979) (effective May 10, 1980).

¹¹⁷*Id.* § 1693d(f).

¹¹⁸*Id.* § 1693e.

¹¹⁹*Id.* § 1693e(a).

¹²⁰*Id.*

the oral notification.¹²¹ The requirement of written confirmation applies only to the extent that the financial institution advises the consumer of it when he gives oral notification. If the amount to be paid is not fixed in advance, the financial institution or designated payee must give reasonable advance notice to the consumer, in accordance with regulations of the Board, of the amount to be transferred and the projected date of transfer.¹²²

e. Unauthorized transfers.—Unauthorized electronic fund transfers create problems which can be seen best by example. Take the case of a consumer with a card and access code which permit her to withdraw cash from her account through an automated teller. Assume that the card and access code are lost or stolen and fall into the hands of someone who uses them to draw all the funds, without authority, from her account. The loss of a total account balance could be devastating to a consumer.

This type of loss would be similar to the loss associated with the unauthorized use of credit cards. Of course, nearly ten years ago Congress enacted section 133 of the CCPA to protect cardholders against ruinous loss from unauthorized credit card use.¹²³ Nevertheless, CCPA section 133 does not give the cardholder complete protection; it creates an incentive for the cardholder to avoid loss or theft of cards and to report losses promptly by making him responsible for fifty dollars of unauthorized charges under certain circumstances.¹²⁴ Congress borrowed heavily from this credit card provision in creating protection for consumers against unauthorized electronic fund transfers.¹²⁵

EFT protects consumers from liability only if an electronic transfer is unauthorized.¹²⁶ The new law defines "unauthorized electronic fund transfer" as a "transfer from a consumer's account initiated by a person other than the consumer without actual authority to initiate such transfer and from which the consumer receives no benefit"¹²⁷ The expression does not include cases in which the consumer has authorized another person to use his card and access code, even though the other person's use of the card exceeds authority given.¹²⁸ Also, the expression does not encompass transac-

¹²¹*Id.*

¹²²*Id.* § 1693e(b).

¹²³Pub. L. No. 91-508, § 502(a), 84 Stat. 1126 (1970) (codified at 15 U.S.C. § 1643 (1976)).

¹²⁴*Id.*

¹²⁵SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, FAIR FUND TRANSFER ACT, S. REP. NO. 915, 95th Cong., 2d Sess. 6, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 9403, 9408.

¹²⁶15 U.S.C.A. § 1693g (West Supp. 1979) (effective February 10, 1979).

¹²⁷*Id.* § 1693a(11) (West Supp. 1979) (effective May 10, 1980).

¹²⁸*Id.* § 1693a(11)(A).

tions initiated fraudulently by the consumer¹²⁹ or transfers which result from error made by a financial institution.¹³⁰

It is interesting to note that under EFT a transfer is unauthorized only if it is made "without actual authority."¹³¹ The quoted language suggests that if a wrongdoer had apparent authority the use would still be unauthorized. This definition would appear to mark a significant departure from the CCPA provision on credit cards which states that use is authorized if the wrongdoer had apparent authority.¹³² EFT provides for this situation, however, by excluding from the definition of unauthorized transfers those cases in which the consumer has furnished the card and code to another person.¹³³ EFT's definition of unauthorized transfers may constitute a better way to circumscribe consumer protection than CCPA's use of the doctrine of apparent authority.

If an electronic transfer is unauthorized, EFT accords protection, but the protection is limited just as it is for credit cardholders.¹³⁴ The consumer is responsible for the lesser of fifty dollars or the amount of money transferred in the unauthorized transaction before the financial institution receives notice or learns of circumstances which give it the reasonable belief that there has been or may be an unauthorized transfer.¹³⁵ This liability, like the liability imposed on cardholders for unauthorized use, is designed to insure that the consumer will carefully protect cards and access codes and promptly report losses.¹³⁶ Finally, there are some conditions to this limited liability. The financial institution will be able to impose the limited liability only if the card was accepted¹³⁷ and if

¹²⁹*Id.* § 1693a(11)(B).

¹³⁰*Id.* § 1693a(11)(C).

¹³¹*Id.* § 1693a(11).

¹³²15 U.S.C. § 1602(o) (1976).

¹³³15 U.S.C.A. § 1693a(11)(A) (West Supp. 1979).

¹³⁴*Id.* § 1693g.

¹³⁵*Id.* § 1693g(a)(1)-(a)(2).

¹³⁶Congress did not include in EFT the sort of notification mechanism found in the provision for credit cards. CCPA § 133a provides that the card issuer must provide the cardholder with a self-addressed, prestamped notification which may be used by the cardholder in the event of loss. 15 U.S.C. § 1643(a) (1976). There is evidence that these prestamped notice forms have not been used. The Federal Reserve Board has proposed legislation, now pending in Congress, which would omit this provision. SENATE COMM. ON BANKING, FINANCE, AND URBAN AFFAIRS, TRUTH IN LENDING ACT, S. REP. NO. 108, 96th Cong., 1st Sess. 32 (1979).

¹³⁷15 U.S.C.A. § 1693g(a) (West Supp. 1979). The term "accepted card" means a card, code, or other means of access to a consumer's account for the purpose of initiating electronic fund transfers when the person to whom such card or other means of access was issued has requested and received or has signed or has used, or authorized another to use, such card or other means of access for the purpose of transferring money between accounts or obtaining money, property, labor, or services

Id. § 1693a(1) (West Supp. 1979) (effective May 10, 1980).

there is a means whereby the user can be identified as the person authorized to use the card.¹³⁸

Unlike the CCPA provision on credit cards, EFT creates two additional risks for the consumer which appear to be designed to encourage him to give notice of loss to the financial institution. Even though the transaction is unauthorized, the consumer will be responsible for losses beyond the fifty dollar limit which would not have occurred but for the consumer's failure to advise the financial institution of the unauthorized transaction within sixty days of transmittal of the statement on which that transaction is recorded.¹³⁹ In addition, the consumer will be liable "for losses which the financial institution establishes would not have occurred but for the failure of the consumer to report any loss or theft of a card or other means of access within two business days after the consumer learns of the loss or theft"¹⁴⁰ However, the consumer's failure to give notice will not result in liability for all losses. Liability is limited to the lesser of \$500 or the amount of unauthorized transfers made following the close of two business days after the consumer learns of the loss but before notice to the financial institution.¹⁴¹

In any litigation involving a consumer's liability for an unauthorized transfer, the burden of proof will be on the financial institution to establish that the transfer was authorized or, if unauthorized, that the card was accepted, that there is a method whereby the user's identity can be fixed, and that the disclosures pertinent to use of the card were made.¹⁴² Finally, it is clear that states may make laws more protective for consumers. EFT section 1693g(d) provides that "nothing in this section imposes liability upon a consumer for an unauthorized transfer in excess of his liability for such a transfer under applicable law or under any agreement with the consumer's financial institution."¹⁴³

f. Error resolution.—In 1974, Congress enacted the Fair Credit Billing Act,¹⁴⁴ which became a part of the CCPA. The provisions of the Act require creditors to respond to and resolve billing errors brought to their attention in writing by customers. EFT contains a procedure for resolving errors in electronic fund transfer systems¹⁴⁵ which bears some similarity to the Fair Credit Billing Act procedure. The EFT error resolution procedure, however, is more

¹³⁸*Id.* § 1693g(a).

¹³⁹*Id.*

¹⁴⁰*Id.*

¹⁴¹*Id.*

¹⁴²*Id.* § 1693g(b).

¹⁴³*Id.* § 1693g(d).

¹⁴⁴16 U.S.C. § 1666 (1976).

¹⁴⁵15 U.S.C.A. § 1693f (West Supp. 1979) (effective May 10, 1980).

rigorous from a creditor's viewpoint than that of the Fair Credit Billing Act.

The EFT error resolution procedure begins when the financial institution provides the consumer with documentation or notification of a transfer involving the consumer's account.¹⁴⁶ This is an event comparable to a creditor's sending a statement of the obligor's account under the Fair Credit Billing Act.¹⁴⁷ If the consumer finds an error in the documentation or notice he may give notice, either oral or written, setting forth his name and account number, his belief that the notice or documentation contains an error, the amount of the error, and the reasons for his belief.¹⁴⁸ The consumer must give the required notice within sixty days after transmission of notification or documentation by the financial institution. If the notice is oral, the financial institution may require written confirmation within ten business days. In order to impose this requirement, the financial institution must inform the consumer of it at the time of oral notice and must provide an address to which the confirmation should be sent.¹⁴⁹

Under either the Fair Credit Billing Act or EFT, the type of inquiry raised or grievance alleged by the consumer may be important because only certain events trigger the dispute resolution requirements. The Fair Credit Billing Act provisions define billing error narrowly.¹⁵⁰ For example, an alleged defect in the quality of a product accepted by a consumer does not constitute a billing error;¹⁵¹ hence, notification to the creditor of the defect will not trigger the billing error resolution procedure. Similarly, EFT's definition of error is limited. For purposes of the section dealing with error resolution,¹⁵² error comprises: (1) an unauthorized electronic fund transfer, (2) an incorrect transfer from or to a consumer's account, (3) an omission of a transfer from a statement, (4) a computational error, (5) receipt by the consumer of an incorrect amount of cash from a cash machine, (6) a request by the consumer for additional information, or (7) any other error described in regulations of the Board.¹⁵³ The consumer's grievance would have to fall into one of these categories to trigger the EFT resolution procedure.

¹⁴⁶*Id.* § 1693f(a).

¹⁴⁷*See id.* § 1666. Transmittal of the statement of the obligor's account must precede notice of a billing error which, in turn, requires the creditor to resolve the error pursuant to Board regulations.

¹⁴⁸*Id.* § 1693f(a)(1)-(a)(3).

¹⁴⁹*Id.* § 1693f(a).

¹⁵⁰Regulation Z, 12 C.F.R. § 226.2(j) (1978).

¹⁵¹*Id.*

¹⁵²15 U.S.C.A. § 1693f (West Supp. 1979) (effective May 10, 1980).

¹⁵³*Id.* § 1693f(f).

The receipt of notice of an error creates duties on the part of the financial institution which can be fulfilled by either one of two courses of action. On the one hand, the financial institution can investigate the alleged error and report the results of the investigation to the consumer within ten business days.¹⁵⁴ As an alternative, the financial institution can conditionally recredit the consumer's account for the amount in dispute within ten business days.¹⁵⁵ In that case, the financial institution has a period of forty-five days from receipt of notice within which to investigate and report. Of course, during that forty-five-day period the consumer is entitled to use the funds.¹⁵⁶

If the financial institution determines after investigation that the consumer's account was in error, it must make a correction in its records, including the crediting of interest when applicable, within one business day.¹⁵⁷ If the financial institution concludes that there was no error, it must provide the consumer with an explanation of its findings within three business days after its investigation.¹⁵⁸ Along with this report, the financial institution must include notice of the consumer's right to request reproductions of documents on which the financial institution relied in making its judgment. Thereafter, upon the consumer's request, the financial institution must promptly furnish reproductions of those documents.¹⁵⁹

The time periods described above appear to operate without taking into account the total time period available to the financial institution for conducting its investigation. For instance, if the financial institution were to recredit the consumer's account immediately on receipt of the notice of error, it would have forty-five days within which to complete its investigation and report.¹⁶⁰ However, if the investigation were completed sooner, the financial institution would be obligated to report before expiration of the forty-five-day period. The report would be required within one day of completion if an error were found,¹⁶¹ and within three days if the investigation showed that there was no error.¹⁶²

A financial institution which fails to comply with any of the requirements for error resolution will be responsible for the civil penalties provided in the section on civil liability.¹⁶³ In addition, the

¹⁵⁴*Id.* § 1693f(a).

¹⁵⁵*Id.* § 1693f(c).

¹⁵⁶*Id.*

¹⁵⁷*Id.* § 1693f(b).

¹⁵⁸*Id.* § 1693f(d).

¹⁵⁹*Id.*

¹⁶⁰*Id.* § 1693f(c).

¹⁶¹*Id.* § 1693f(b).

¹⁶²*Id.* § 1693f(d).

¹⁶³*Id.* § 1693m.

financial institution may be liable for treble actual damages¹⁶⁴ if it "did not make a good faith investigation [or] did not have a reasonable basis for believing that the consumer's account was not in error"¹⁶⁵ The financial institution can avoid this treble damage liability by provisionally recrediting the customer's account within the required ten-day period.¹⁶⁶ The financial institution can also be held responsible for treble actual damages if it "knowingly and willfully concluded that the consumer's account was not in error when such conclusion could not reasonably have been drawn from the evidence available to the financial institution at the time of its investigation"¹⁶⁷

g. Private remedies.—The EFT provisions on civil liability, section 915,¹⁶⁸ borrow heavily from those found in section 130 (Truth in Lending and Leasing) of the CCPA.¹⁶⁹ EFT provides that in an individual action by a consumer, a financial institution which fails to comply with any requirement with respect to the consumer is liable to him for actual damages, a civil penalty not less than \$100 nor greater than \$1,000, and costs of the action together with a reasonable attorney's fee as determined by the court.¹⁷⁰ In a class action the plaintiffs may recover actual damages plus a civil penalty, except that as to each member there is no minimum civil penalty and the total civil penalty is limited to the lesser of \$500,000 or one percent of the net worth of the defendant.¹⁷¹

EFT borrowed guidelines for fixing the appropriate civil penalty from the Fair Debt Collection Practices Act.¹⁷² In an individual action, the guidelines refer to "the frequency and persistence of noncompliance, the nature of such noncompliance, and the extent to which the noncompliance was intentional"¹⁷³ In a class action, the court considers not only the factors quoted above, but in addition "the resources of the defendant [and] the number of persons adversely affected"¹⁷⁴

The EFT provisions on excuse for violations borrow several ideas from other recent federal consumer credit laws. First, financial institutions are excused from liability for unintentional violations

¹⁶⁴*Id.* § 1693f(e).

¹⁶⁵*Id.* § 1693f(e)(1).

¹⁶⁶*Id.*

¹⁶⁷*Id.* § 1693f(e)(2).

¹⁶⁸*Id.* § 1693m.

¹⁶⁹15 U.S.C. § 1640 (1976).

¹⁷⁰15 U.S.C.A. § 1693m(a) (West Supp. 1979).

¹⁷¹*Id.*

¹⁷²15 U.S.C. § 1692 (Supp. I 1977).

¹⁷³15 U.S.C.A. § 1693m(b)(1) (West Supp. 1979).

¹⁷⁴*Id.* § 1693m(b)(2).

resulting from "bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."¹⁷⁵ Second, there is excuse if the violation resulted from: (1) reliance by the financial institution on a Board rule or on an interpretation or approval issued by an authorized official of the Federal Reserve System, or (2) reliance by the financial institution on model forms or clauses issued by the Board.¹⁷⁶ Finally, the financial institution is released from liability for failure to comply with any requirement of EFT if it discovers the failure to comply, notifies the consumer of the failure before a law suit is instituted under EFT, and makes an appropriate adjustment to the consumer's account, including payment of any actual damages.¹⁷⁷ This last provision is a variation of the principle found in section 130 of the CCPA.¹⁷⁸ Under that section, in order to be excused from liability the creditor must act within fifteen days after discovery of an error and prior to receipt of written notice of the error as well as prior to commencement of a law suit. EFT simply requires the financial institution to act before a law suit is filed.¹⁷⁹ It does not seem to matter that the consumer may have first notified the financial institution of the error. As to the adjustment, under EFT the financial institution must pay actual damages in order to avoid the civil penalty,¹⁸⁰ whereas under Truth in Lending the creditor must adjust the terms of the credit in the customer's favor to coincide with any disclosure error.¹⁸¹

Finally, in enacting provisions on costs and attorney's fees, Congress borrowed from the Fair Debt Collection Practices Act.¹⁸² EFT section 915F¹⁸³ provides that if the court finds "that an unsuccessful action . . . was brought in bad faith or for purposes of harrassment, [it] shall award to the defendant attorney's fees reasonable in relation to the work expended and costs."¹⁸⁴

¹⁷⁵*Id.* § 1693m(c).

¹⁷⁶*Id.* § 1693m(d).

¹⁷⁷*Id.* § 1693m(e).

¹⁷⁸15 U.S.C. § 1640(b) (1970).

¹⁷⁹15 U.S.C.A. § 1693m(e) (West Supp. 1979).

¹⁸⁰*Id.*

¹⁸¹15 U.S.C. § 1640(b) (1976).

¹⁸²15 U.S.C. § 1692 (Supp. I 1977).

¹⁸³15 U.S.C.A. § 1693m(f) (West Supp. 1979).

¹⁸⁴*Id.*

VI. Corporations

*Paul J. Galanti**

Five cases decided by the courts and several significant pieces of legislation adopted by the Indiana General Assembly during the survey period warrant discussion.¹

A. Insider Security Transactions

Perhaps the most significant case decided during the survey period, and arguably the most unfortunate, was not decided by an Indiana court but rather by the United States Court of Appeals for the Seventh Circuit purporting to apply Indiana law. In *Freeman v. Decio*,² the court affirmed an order granting summary judgment for the defendants in a derivative action brought against certain officers and directors of a publicly held corporation for allegedly using material inside information as the basis for trading shares of the corporation.³ The plaintiff also alleged that one defendant had engaged in "short swing" trading in violation of section 16(b) of the 1934 Act.⁴

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¹One decision with Indiana connections decided during the survey period is worthy of a passing reference. *Indiana Nat'l Bank v. Mobil Oil Corp.*, 578 F.2d 180 (7th Cir. 1978), affirmed a judgment for Mobil in an action brought by banks representing offerees in a tender offer for the securities of Marcor, Inc. *Id.* at 187. The plaintiff banks contended that Mobil was obligated under §§ 14(d)(6) and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(d)(6), (e) (1976) [hereinafter referred to as the 1934 Act] to accept the tendered shares. The court of appeals rejected this contention and held that because the banks had not deposited the securities within eight days of Mobil's "public announcement" of the number of shares it would purchase under the tender offer, as specified in the tender offer, Mobil was not obligated to accept late-tendered shares. 578 F.2d at 184. The main issue before the court was whether Mobil's issuance of a press release to the financial press constituted a "public announcement" which triggered the banks' obligation to deposit the shares. The court held: (1) The phrase "public announcement" has a generally accepted meaning in the securities field that would clearly encompass press releases, which sophisticated parties, such as the banks, should have known; (2) the banks were not entitled to individual notice of the obligation to deposit the shares; and (3) the publicity surrounding the press release was more than enough notice to alert the banks of their obligations. *Id.* at 185-87.

²584 F.2d 186 (7th Cir. 1978).

³*Id.* at 200.

⁴15 U.S.C. § 78p(b) (1976). Section 16(b) provides that [f]or the purpose of preventing the unfair use of [inside] information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such

The most important issue in *Freeman* was whether Indiana law permits a shareholder to maintain a derivative action against insiders who trade shares of the corporation on the basis of material inside, meaning nondisclosed, information. In effect, the principal question was whether Indiana would follow the New York Court of Appeals' landmark decision in *Diamond v. Oreamuno*,⁵ which established a common law right of a corporation to recover profits made by insiders using inside information, or the Florida Supreme Court's decision in *Schein v. Chasen*,⁶ which refused to adopt the innovative

issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer

Id. The justification for the harsh remedy of § 16(b), which applies to innocent statutory insiders as well as those who trade with manipulative intent, is the supposed *in terrorem* effect upon the latter. It is doubtful that § 16(b) has this effect, and it has been roundly criticized by commentators. See generally Bateman, *The Pragmatic Interpretation of Section 16(b) and the Need for Clarification*, 45 ST. JOHN'S L. REV. 772 (1971); Munter, *Section 16(b) of the Securities Exchange Act of 1934: An Alternative to "Burning Down the Barn in Order to Kill the Rats,"* 52 CORNELL L.Q. 69 (1966); Wu, *An Economist Looks at Section 16 of the Securities Exchange Act of 1934*, 68 COLUM. L. REV. 260 (1968).

Unfortunately, *Freeman* is somewhat muddy about which defendants were charged with violating § 16(b). At one point, the court refers to two of the defendants who were outside directors of the corporation, 584 F.2d at 187, but at another point, the opinion refers to one of the outside directors and an inside director who was an officer as well as a director of the corporation. *Id.* at 188. It appears that the first reference is in error. The officer-director who was charged with the § 16(b) violation apparently was not charged with trading on inside information, and hence he would not have been a party to the suit if there had not been an alleged § 16(b) violation. This supposition is supported by the fact that the only discussion in the opinion of the potential § 16(b) violation pertained to the summary judgment entered in favor of the inside director. See discussion at note 42 *infra*. It seems that the district court did not consider or rule on the § 16(b) claim against the outside director. 584 F.2d at 188 n.2. This conclusion, however, is not absolutely clear because in still another portion of the opinion, the court stated that the fourth defendant, the inside director, was alleged to have made sales and gifts of stock at various times knowing that the financial data for the corporation were misstated. *Id.* at 197. It is not certain whether the complaint was ambiguous or the opinion poorly written.

⁵24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 46 (1969). *Diamond* generated considerable interest and, contrary to the inference that can be drawn from the footnotes in *Freeman*, generally favorable comment in legal journals. See, e.g., Note, *A Comparison of Insider Liability Under Diamond v. Oreamuno and Federal Securities Laws*, 11 B.C. INDUS. & COM. L. REV. 499 (1970); Note, *Insider Trading on Undisclosed Corporate Information: Diamond v. Oreamuno*, 22 ME. L. REV. 283 (1970); Note, *Diamond v. Oreamuno: A Fresh Approach to Insider Trading and the Duties of the Corporate Fiduciary*, 31 U. PITT. L. REV. 296 (1969); 37 FORDHAM L. REV. 477 (1969); 83 HARV. L. REV. 1421 (1970); 18 J. PUB. L. 493 (1969); 45 NOTRE DAME LAW. 314 (1970); 23 SW. L.J. 921 (1969); 55 VA. L. REV. 1521 (1969); 22 VAND. L. REV. 1412 (1969); 1970 WIS. L. REV. 576. See also Note, *Common Law Corporate Recovery for Trading on Non-Public Information*, 74 COLUM. L. REV. 269 (1974).

⁶313 So. 2d 739 (Fla. 1975), discussed in 28 U. FLA. L. REV. 223 (1975), and noted in 41 MO. L. REV. 589 (1976). *Schein* was initially decided by the Second Circuit Court

ruling of *Diamond* in a fact situation that would have required an expansive reading of *Diamond* to impose liability.

The *Freeman* decision is unfortunate in two major respects. First, at a time when the protection afforded security owners under the federal securities laws is being drastically curtailed by the United States Supreme Court,⁷ the court decided that Indiana would follow the status quo approach of Florida, a basically noncommercial state, rather than the innovative approach of New York, the most important commercial state in the country, in developing the common law to meet a changing social need. The second unfortunate aspect of *Freeman* is that the court really did not have to decide whether Indiana would adopt the *Diamond* view because an alternative holding of the trial court, affirmed by the court of appeals, was that the defendants *had not traded* on material inside information.⁸ Thus, the court could have and should have relied on the alternative ground to keep the issue open until it could be ruled on by an Indiana court.

In fact, the Seventh Circuit specifically declined to employ the certified question rule of the Indiana Rules of Appellate Procedure⁹ because it "agree[d] with the district court's conclusion that there [was] no factual basis for the plaintiff's allegations that the defendants sold Skyline stock on the basis of inside information"¹⁰ Certainly, the Seventh Circuit had precedent for using this pro-

of Appeals as a diversity case. *Schein v. Chasen*, 478 F.2d 817 (2d Cir. 1973), *vacated and remanded sub nom. Lehman Bros. v. Schein*, 416 U.S. 386 (1974). The Second Circuit's decision in *Schein* also generated considerable, although not necessarily favorable, comment in legal journals. See Note, *Tippee Liability Under Common Law*, 11 HOUS. L. REV. 200 (1973); Note, *From Brophy to Diamond to Schein: Muddled Thinking, Excellent Result*, 1 J. CORP. L. 83 (1975); Note, *"Tippee" Liability Extended to Remote Third Parties*, 53 NEB. L. REV. 279 (1974); Note, *Restitution as a Common Law Basis for Holding an Outside Nontrading Tippee Liable for Tippee Profits*, 24 SYRACUSE L. REV. 1369 (1973); Note, *Securities Fraud Under State Common Law: Schein v. Chasen—Expanding Liability for the Tippee and Tippee*, 45 U. COLO. L. REV. 519 (1974); 40 BROOKLYN L. REV. 1334 (1974); 53 B.U.L. REV. 1150 (1973); 42 FORDHAM L. REV. 211 (1973); 87 HARV. L. REV. 675 (1974); 45 MISS. L.J. 260 (1974); 48 ST. JOHN'S L. REV. 415 (1973); 5 ST. MARY'S L.J. 834 (1974); 48 TULANE L. REV. 166 (1973); 26 VAND. L. REV. 1337 (1973); 19 VILL. L. REV. 533 (1974); 13 WASHBURN L.J. 534 (1974).

⁷See, e.g., *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977); *TSC Indus., Inc. v. Northway Inc.*, 426 U.S. 438 (1976); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232 (1976); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975); *United Hous. Foundation, Inc. v. Forman*, 421 U.S. 837 (1975); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582 (1973); *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418 (1972).

⁸584 F.2d at 200.

⁹IND. R. APP. P. 15(O).

¹⁰584 F.2d at 189 n.8.

cedure because *Gabhart v. Gabhart*,¹¹ in which the Indiana Supreme Court held that Indiana law protects minority shareholders through judicial review of corporate squeeze-out mergers,¹² was a certified question. Thus, in *Gabhart* the Seventh Circuit was willing to utilize the procedure to determine an important issue of Indiana law, but in *Freeman* the court declined to do so because, if the opinion can be taken at face value, it really did not have to decide the question. If the issue was so important that the Seventh Circuit felt compelled to decide it when an alternative holding was available, the issue certainly was important enough to certify to the Indiana Supreme Court.

It is difficult to fathom why the Seventh Circuit was unwilling to utilize the certified question procedure.¹³ A reading of *Freeman*, however, discloses an extraordinary antipathy toward the development and evolution of common law protection of shareholder interests that approaches an attitude of trying to stop the development of any "newfangled" law in this area. Perhaps the court, in its hostility toward *Diamond*, felt that if the issue had been presented to the Indiana Supreme Court, which had taken a major step in protecting the interests of minority shareholders in *Gabhart*, the Indiana court might have adopted the *Diamond* approach. If so, this is the view of Professor Manne with a vengeance.¹⁴

The *Freeman* complaint alleged that the defendant directors had breached their fiduciary duties to Skyline Corporation by trading in its stock on the basis of material nonpublic information acquired by virtue of their official positions, and further alleged that the directors should be compelled to account to Skyline in a derivative action for the profits from those transactions.¹⁵ The Seventh Circuit indicated that the only case brought to its attention which raised the question whether *Diamond* would be followed in another jurisdiction was *Schein*. Apparently, the court was unaware that the Second Circuit, which initially decided in *Schein* that Florida would adopt *Diamond*, declined to extend the doctrine to a principal shareholder of a corporation who was neither an officer nor a director.¹⁶

¹¹370 N.E.2d 345 (Ind. 1977).

¹²*Id.* at 353.

¹³*Schein* was certified to the Florida Supreme Court by the Second Circuit after it was vacated and remanded by the Supreme Court. 313 So. 2d 739 (Fla. 1975). The Second Circuit's decision in *Schein* has been called result oriented, with the court taking the position that a remedy should exist for a wrong. See 40 BROOKLYN L. REV. 1334, 1344 (1974).

¹⁴See discussion at note 19 *infra* and accompanying text.

¹⁵584 F.2d at 186. The profits would be the difference between the price realized by the defendants and the price of the stock after the adverse developments were disclosed.

¹⁶*Frigitemp Corp. v. Financial Dynamics Fund, Inc.*, 524 F.2d 275 (2d Cir. 1975).

An understanding of *Freeman* requires an understanding of *Diamond*. *Diamond* was a derivative action by a shareholder of Management Assistance, Inc. (MAI) charging that two of the defendants, the chairman of the board and the president, sold MAI shares before a substantial decline in the net earnings of the corporation was announced. A precipitous decline in the price of the stock followed the disclosure of the drop in earnings. The New York Court of Appeals reasoned that "a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship . . . [cannot] exploit that knowledge or information for his own personal benefit but must account to his principal for any profits" ¹⁷ To the court, this was "merely a corollary to the broader principle, inherent in the nature of the fiduciary relationship, that prohibits a trustee or agent from extracting secret profits from his position of trust." ¹⁸

Diamond presented the court with a situation in which the acts of the defendants were admittedly wrongful but the corporation had not suffered injury or damage. The defendants argued that because the corporation was not "damaged" and was unaffected by their actions, it should not be permitted to recover the proceeds and, consequently, a derivative action was inappropriate. ¹⁹ The court rejected this contention, reasoning that an allegation of damage to the corporation was not an essential requirement for a cause of action founded on a breach of fiduciary duty. ²⁰ When fiduciary duties are involved, the law does not merely compensate the plaintiff, here the corporation represented by the shareholder, for the defendant's wrongs but also attempts to prevent wrongs "by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates." ²¹ In effect, the information on MAI's declining fortunes was treated as an "asset," which could not be used by a fiduciary despite a lack of injury to the corporation.

The court was mainly interested in the relationship between the corporation and the defendants rather than of the relationship between the defendants and the unknown persons who might have purchased their shares over the stock exchange. The court reasoned:

Thus, the Second Circuit recognized the limits of *Diamond* even before *Schein* was decided.

¹⁷24 N.Y.2d at 497, 248 N.E.2d at 912, 301 N.Y.S.2d at 80.

¹⁸*Id.* at 497-98, 248 N.E.2d at 912, 301 N.Y.S.2d at 80.

¹⁹For a discussion of the nature of shareholder derivative actions, see generally H. HENNA, HANDBOOK OF THE LAW OF CORPORATIONS §§ 358-360 (2d ed. 1970); 2 G. HORNSTEIN, CORPORATION LAW & PRACTICE §§ 711, 716, 734 (1959); Hornstein, *The Shareholder's Derivative Suit in the United States*, 1967 J. BUS. L. 282.

²⁰24 N.Y.2d at 498, 248 N.E.2d at 912, 301 N.Y.S.2d at 81.

²¹*Id.*, 248 N.E.2d at 912, 301 N.Y.S.2d at 81 (quoting *Dutton v. Willner*, 52 N.Y. 312, 319 (1873)).

The primary concern, in a case such as this, is not to determine whether the corporation has been damaged but to decide, as between the corporation and the defendants, who has a higher claim to the proceeds derived from the exploitation of the information. In our opinion, there can be no justification for permitting officers and directors, such as the defendants, to retain for themselves profits, which it is alleged, they derived solely from exploiting information gained by virtue of their inside position as corporate officials.²²

The *Freeman* court did not believe Indiana would take a similar position. The court reluctantly acknowledged the conventional wisdom that insider trading should be deterred although it may lessen the "efficiency" of the capital allocation function of the securities markets.²³ Clearly, the court would prefer to follow the views of the foremost advocate of the benefits of "insider trading," Professor Henry Manne, who suggests that insiders *should* be allowed to trade freely on inside information and that such a right "may be fundamental to the survival of our corporate system."²⁴ Professor Manne asserts that such trading helps the market because the appropriate price for stock is determined on the basis of the best information available and that the best information is possessed by insiders. Essentially, Professor Manne is arguing that insider trading is a useful device for compensating the true entrepreneurs in a corporation in which traditional forms of compensation might not be adequate. Admittedly, allowing an inside innovator who has participated in a new development that will increase the value of his company's shares to take advantage of the uninformed public has some appeal. Although allowing an innovator to be compensated by a shareholder who sells without knowledge of the potential development might be justified—even though the corporation itself should perhaps pay the innovator his worth, it is difficult, if not impossible, to justify a rule permitting defendants such as those in *Diamond* and *Freeman* to "bail out" before news of *adverse* developments becomes public. In effect, the *Freeman* court has permitted such action by deciding that Indiana courts would not penalize insiders who benefited from nonpublic information of adverse developments to the corporation.

In begrudgingly accepting the proposition that insider trading should be discouraged, the *Freeman* court emphasized that section

²²24 N.Y.2d at 498, 248 N.E.2d at 912, 301 N.Y.S.2d at 81.

²³584 F.2d at 190.

²⁴H. MANNE, INSIDER TRADING IN THE STOCK MARKET 110 (1966). As the *Freeman* court notes, Professor Manne's views are quite controversial. 584 F.2d at 190 n.12.

16(b) of the 1934 Act was a response to abuse of inside information and noted that the Securities and Exchange Commission (SEC) has also utilized the powers granted under section 15(c)(1) of the 1934 Act²⁵ and SEC Rule 10b-5²⁶ to police insider trading.²⁷ The court further noted that “victims” of insider trading may recover damages under the common law in some cases²⁸ under rule 10b-5, or even under provisions of state Blue Sky laws.²⁹ Unlike the *Diamond* court, however, the *Freeman* court did not feel that the existing remedies for controlling insider trading were inadequate. The court discussed the “victims” of insider trading in a lengthy footnote³⁰ and observed that there was considerable ambiguity about who should be considered a direct victim of insider trading. The court posited that although those persons who bought from or sold to insiders in impersonal market transactions might feel cheated, they probably would have traded even if the insiders had stayed out of the market. The court further reasoned, though, that persons who traded securities who would not have done so had the insiders made public their inside information might reasonably be considered victims.³¹ The problem with this approach is that it broadens the class of victims to include all persons who traded from the time that the insiders entered the market until the information became public, or at least includes all persons who traded at the same time as the insiders.³² This class could be enormous, yet the insiders would be liable to everyone. This is not a point in favor of the status quo approach; however, this is an argument in favor of *Diamond*. Under the approach taken by the *Diamond* court, rejected by *Freeman*, the issue is whether the insiders should keep their profits or disgorge them to the corporation. If the corporation recoups the profits, those persons who bought from insiders who were bailing out at least find their investment has appreciated in value to the extent of the profits, and

²⁵15 U.S.C. § 78o(c)(1) (1976).

²⁶17 C.F.R. § 240.10b-5 (1979). See, e.g., SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968). The *Freeman* court also mentioned § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a). 584 F.2d at 191. Although contrary to the court's implication, the likelihood of the present Supreme Court upholding a private right of action under that section is somewhat remote.

²⁷584 F.2d at 190.

²⁸See, e.g., *Strong v. Repide*, 213 U.S. 419 (1909); *Low v. Wheeler*, 207 Cal. App. 2d 477, 24 Cal. Rptr. 538 (1962); *Hotchkiss v. Fischer*, 139 Kan. 333, 31 P.2d 37 (1934).

²⁹See, e.g., IND. CODE § 23-2-1-12 (1976).

³⁰584 F.2d at 191 n.20.

³¹*Id.*

³²See generally Fleischer, *Securities Trading and Corporate Information Practices: The Implications of the Texas Gulf Sulphur Proceedings*, 51 VA. L. REV. 1271 (1965); Note, *Damages to Uninformed Traders for Insider Trading on Impersonal Exchanges*, 74 COLUM. L. REV. 299 (1974).

those persons who bought at the same time but not from the insiders also find that their investment has become more valuable. Nothing in *Diamond* suggests that insiders should be compelled to disclose adverse information as soon as it is available because there can be legitimate reasons for keeping it temporarily confidential, but when the insiders profit from that confidential knowledge, they should not be permitted to keep their wrongfully obtained gains.

The *Diamond* court relied heavily on the Delaware decision in *Brophy v. Cities Service Co.*,³³ which held that a corporation could recover the profits derived by a confidential secretary to a director of the corporation who, knowing that the corporation was about to enter the market to purchase its own shares, purchased shares and resold them at a profit to the corporation. The *Diamond* court also relied on section 388 of the *Restatement (Second) of Agency*,³⁴ which establishes the broad rule prohibiting an agent from taking advantage of a corporate opportunity.³⁵ The *Freeman* court rejected the premise that all inside information should be considered a corporate asset and posited that it would be better to inquire whether there was any potential loss to the corporation from the use of the information in insider trading. According to the court, the problem with *Diamond* was that the defendants' information was not potentially valuable to the corporation in its own right because the corporation itself could not exploit it in dealing in its own securities. Hence, the information was not an "asset," and it therefore could be exploited by an insider.³⁶ In an age of distrust of large corporations and lack of public interest in the securities market, such formalistic reasoning is appalling.

Even assuming that damage to the corporation³⁷ is a crucial element of a shareholder derivative action against insiders who have abused their position,³⁸ the *Diamond* court recognized that regard-

³³31 Del. Ch. 241, 70 A.2d 5 (1949), noted in 63 HARV. L. REV. 1446 (1950).

³⁴RESTATEMENT (SECOND) OF AGENCY § 388 (1957). See also *id.*, Comment c.

³⁵To be sure, trading on inside information is not the typical practice covered by § 388. See generally 37 FORDHAM L. REV. 477 (1969).

³⁶584 F.2d at 194.

³⁷The *Freeman* court distinguished *Brophy* on this ground. In *Brophy*, the corporation was directly injured because the defendant's purchase of corporate stock for his own account could force the price to rise, and hence the corporation would have to pay more for its shares than it otherwise would have to.

³⁸It should be noted that Florida, where *Schein* was decided, clearly requires damage to the corporation as a prerequisite for a shareholder derivative action. See *Palma v. Zerbey*, 189 So. 2d 510 (Fla. Dist. Ct. App. 1966), cert. denied, 200 So. 2d 814 (1967); *Citizen's Nat'l Bank v. Peters*, 175 So. 2d 54 (Fla. Dist. Ct. App. 1965); *Maronek v. Atlantis Hotel, Inc.*, 148 So. 2d 721 (Fla. Dist. Ct. App. 1963); *James Talcott, Inc. v. McDowell*, 148 So. 2d 36 (Fla. Dist. Ct. App. 1962). See generally 28 U. FLA. L. REV. 223, 230 (1975).

less of a lack of specific allegations of damage, harm to the corporation from the defendants' actions could be inferred. The court reasoned that the corporation "has a great interest in maintaining a reputation of integrity, an image of probity, for its management and in insuring the continued public acceptance and marketability of its stock."³⁹ The *Freeman* court considered any harm to the corporation from insider trading as "little different" from the harm that could be inferred whenever a corporate official committed an illegal or unethical act using a corporate asset, which lacks the "element of loss of opportunity or potential susceptibility to outside influence"⁴⁰ necessary to require an accounting to the corporation. Unfortunately, the court failed to recognize that there is a considerable difference between a situation in which an insider misuses an asset, even to the point of embezzling funds from the corporation, and one in which he *trades* on inside information. In the former, the distrust is likely to be directed at the individual *qua* individual rather than at the individual *qua* management of the corporation. In the latter situation, the public is likely to perceive that the ethical standards of the management as a whole are so low that they cannot be trusted not to take advantage of the *investing* public. This perception can hurt all shareholders: those who bought from the insiders without knowledge of the adverse information, those who bought from others without knowledge, and those who did not sell but maintained their stock position.

The *Freeman* court further questioned the *Diamond* analysis of potential double liability of defendants who may be personally liable to purchasers of their stock after disgorging their profits to the corporation. The court did not consider the resort to an interpleader action, suggested in *Diamond* as a means of binding injured investors to the judgment in an action to recover the fund,⁴¹ as an adequate solution to this problem. The court also rejected the *Diamond* contention that double liability should be imposed to more effectively deter insider trading and that double liability is justified analytically because the two causes of action, one on behalf of the investor and one on behalf of the corporation, are based on separate legal wrongs.⁴²

³⁹24 N.Y.2d at 499, 248 N.E.2d at 912, 301 N.Y.S.2d at 81 (1969), *quoted in* 584 F.2d at 194. *See also* Southwest Pump & Mach. Co. v. Forslund, 225 Mo. App. 262, 29 S.W.2d 165 (1930).

⁴⁰584 F.2d at 194.

⁴¹*Id.*

⁴²*Id.* at 195. *See generally* Conant, *Duties of Disclosure of Corporate Insiders Who Purchase Shares*, 46 CORNELL L.Q. 53 (1960); Note, *Common Law Corporate Recovery for Trading on Non-Public Information*, 74 COLUM. L. REV. 269 (1974).

The *Freeman* court concluded, in effect, that the *Diamond* court and the Second Circuit in *Schein* were not really concerned with double liability because the courts doubted that the investors—the true victims of insider trading—would be able to bring suit. Therefore, the possibility of double liability was purely theoretical to those courts.⁴³ The Seventh Circuit rejected this position, reasoning that effective remedies against insider trading have been developed subsequent to the *Diamond* decision. In this respect the court stated:

In spite of other recent developments indicating that such class actions would not become as easy to maintain as some plaintiffs had perhaps hoped, it is clear that the remedies for insider trading under the federal securities laws now constitute a more effective deterrent than they did when *Diamond* was decided.⁴⁴

Unfortunately, the *Freeman* court appears to be operating in a vacuum. The Supreme Court has not only made it more difficult for rule 10b-5 class actions to be brought but its decisions in the last few years display a decided hostility toward *any* shareholder actions under the rule.⁴⁵

Freeman is both tragic and ironic in this respect. The irony is that many of the expansive readings of rule 10b-5 by the lower federal courts were from a perceived inadequacy of the common law to protect the interests of investors in cases of insider trading. Because the Supreme Court has recently taken a position blocking further expansion of rule 10b-5, the only recourse shareholders have is through the development of the common law. The tragedy of *Freeman* is that the court clearly fails to recognize that the position of investors is worse, not better, than it was at the time of *Dia-*

⁴³584 F.2d at 195.

⁴⁴*Id.* at 195-96. The court cited *Eisen v. Carlisle & Jacquelin*, 386 U.S. 1035 (1967), and *Hochfelder v. Ernst & Ernst*, 425 U.S. 909 (1975). Presumably, the court was actually referring to the *Eisen* decision reported at 417 U.S. 156 (1974), because 386 U.S. 1035 reports a denial of certiorari in an earlier stage of the litigation, and was also referring to the *Hochfelder* decision reported at 425 U.S. 186 (1975). *Hochfelder* does not appear at 425 U.S. 909, but does appear at 425 U.S. 986, which only reports a denial of rehearing.

⁴⁵*See generally* cases cited note 6 *supra*. As one observed in discussing *Schein*, the Florida Supreme Court has acknowledged that

[w]hen new relations between men arise . . . law is called in to adjust them. Legal doctrines are predicated on reason and custom, mark their growth from rude beginnings, and, like the order of the universe, are constantly changing to adjust the new relations of society. We have no better proof of this than the development of our common law and system of equity.

41 MO. L. REV. 589, 595 (1976). *See also* 83 HARV. L. REV. 1421, 1432 (1970).

mond. The common law should be evolving to protect investors because of the decline of rule 10b-5, but the *Freeman* court states that the common law will not and does not have to expand because of the availability of the rule 10b-5 cause of action.

In fact, *Freeman* did not consider the possibility that the best remedy for trading on inside information on impersonal stock exchanges may be recovery solely by the corporation and not by investors who bought from or sold to the insiders. Arguably, investors who, by luck, can trace their transactions back to the insiders should not be favored over other investors who traded with noninsiders at the same time with the same degree of ignorance. By allowing the corporation to recoup the profits, all investors will be benefited.

The only Indiana decision discussed in *Freeman* was the early case of *Board of Commissioners v. Reynolds*,⁴⁶ in which it was held that a director does not have a duty to disclose inside information to a shareholder from whom he is buying stock.⁴⁷ The court noted that *Board of Commissioners* and *Diamond* could be distinguished because the former involved fiduciary duties owed to a selling shareholder whereas the latter involved a duty owed to the corporation. The *Freeman* court felt, however, that a jurisdiction that does not protect a selling shareholder from insider trading would be unlikely to create a cause of action in the corporation's favor. The court noted that Indiana had enacted securities laws containing an antifraud provision⁴⁸ since *Board of Commissioners* was decided, but it is not at all clear what relief would be available in the context of *Freeman* other than to the actual purchasers of the shares, if they could be determined. *Freeman* did recognize that *Board of Commissioners* was a thin reed indeed to support the court's position, because the court noted that there have been suggestions that *Board of Commissioners* be overruled.⁴⁹

The Seventh Circuit also agreed with the district court that the defendants had not, in fact, traded on the basis of inside information. This position should have been the sole ground for affirming the decision. There cannot be any valid argument on the point because there did not appear to be sufficient evidence constituting

⁴⁶44 Ind. 509 (1873).

⁴⁷*Id.* at 513.

⁴⁸IND. CODE § 23-2-1-12 (1976), cited in 584 F.2d at 191.

⁴⁹The court referred to Ryan, *Should Tippecanoe County Commissioners v. Reynolds be Overruled?*, 16 IND. L. J. 563 (1941), and noted that the court in *Krull v. Pierce*, 117 Ind. App. 638, 71 N.E.2d 617 (1947), believed it would be overruled. 584 F.2d at 196 n.41. *Krull*, however, does not seem to support this observation, desirable though it might be. The court apparently was unaware that the continuous authority of *Board of Comm'rs* appears to have been recognized in *Yorke v. Batman*, 376 N.E.2d 1211 (Ind. Ct. App. 1978).

"significant probative evidence tending to support the complaint"⁵⁰ to withstand a motion for summary judgment. The court upheld the propriety of considering evidence of the defendants' past patterns of sales of the corporation's shares and of their motivations for making the challenged sales.⁵¹ Although liability for trading on inside information would not be precluded merely because the defendants continued in a pattern of selling shares, the pattern would be relevant in determining whether the insiders were in fact trading on inside information.⁵²

Certain transactions objected to in the complaint could not have been based on inside information because the financial statements allegedly misstating the results for the fiscal period in question were not prepared until the period was over. Furthermore, certain allegations by the plaintiff concerning the accuracy of the financial statements could not stand up to the defendants' evidence explaining the financial results. With respect to the second period during which insider trading was alleged, the court recognized that the decline in the company's earnings was not known to the defendant directors as an "accounting fact" before the end of the quarter in question, unlike the situation in *Diamond*, and found that certain supposed "inside information" was in fact public knowledge.⁵³ In other words, the allegations that the defendants were trading on inside information were pure conjecture.⁵⁴

The Seventh Circuit also held that the failure to disclose predictions of the company's future prospects was not a nondisclosure of material inside information under the circumstances of the case and that this conclusion was appropriate in either the *Diamond* type cause of action or under rule 10b-5.⁵⁵ Although the author clearly disagrees with the *Freeman* conclusion that *Diamond* would be rejected in Indiana, suits should not be allowed when an earnings prediction, which is unsupported by hard information on earnings, sales, or costs, was not disclosed.⁵⁶

⁵⁰584 F.2d at 196-97 (citing *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1967)).

⁵¹584 F.2d at 197.

⁵²*Id.* n.44. The court recognized that an adverse inference of bailing out on the basis of inside information can be drawn against an insider who suddenly sells a significant portion of his holdings if material adverse information about the corporation subsequently becomes public, but the court further recognized that the inference could be nullified if the sales in question were consistent in timing and amount with past patterns or if other circumstances might reasonably account for the sale.

⁵³*Id.* at 199-200.

⁵⁴Admittedly, *Diamond* involved a motion to dismiss whereas *Freeman* involved a motion for summary judgment.

⁵⁵See generally 3 A. BROMBERG, SECURITIES LAW: FRAUD § 8.2, at 197-98 (1977).

⁵⁶The *Freeman* court also affirmed the summary judgment for the director who was charged with insider trading in violation of § 16(b) of the 1934 Act. The plaintiff

B. Representation of Corporations

*State ex rel. Western Parks, Inc. v. Bartholomew County Court*⁵⁷ is an interesting decision involving the propriety of nonattorneys representing corporations in legal proceedings. The Indiana Supreme Court held that Indiana Code section 34-1-60-1, which provides that corporations organized under the Indiana General Corporation Act⁵⁸ and the four professional corporation acts⁵⁹ “need not appear by attorney in civil cases filed on a small claims docket of a circuit, superior or county court,”⁶⁰ was without force or effect, and that “a corporation must be represented by legal counsel in a small claims court proceeding.”⁶¹ Consequently, the court made permanent an alternative writ of mandate and prohibition ordering the respondent, Bartholomew County Court, to refrain from exercising further jurisdiction over the law suit involved in the controversy until either legal counsel appeared on behalf of the plaintiff corporation or the case was dismissed.⁶²

The controversy had its origins in an action filed by Remove All, Inc. against the relator, Western Parks, Inc. The claim was filed by Remove All's office manager who was not an attorney admitted to practice in Indiana. The relator moved to dismiss the action alleging improper venue, but this motion was overruled and the matter was set for trial.⁶³ A default judgment was entered when Western Parks failed to appear at trial. Western Parks also did not appear at a hearing on a motion for proceedings supplemental filed by Remove All's office manager. At or subsequent to that hearing, another non-attorney employee of Remove All signed an application for contempt citation, and the respondent ordered the relator to appear and show cause why it should not be attached and cited for contempt. The contempt hearing was continued, but prior to the new date the relator,

contended that the insider was liable because the restrictions against resale of the stock had expired within six months of the time it was sold. The court rejected this view, and held that the stock was acquired when he became committed to take and pay for it, not when the restrictions lapsed. 587 F.2d at 200. *See Silverman v. Landa*, 306 F.2d 422, 424 (2d Cir. 1962); *Blau v. Ogsbury*, 210 F.2d 426, 427 (2d Cir. 1954). This position is true, although the certificates would not be delivered to the director until the restrictions have lapsed.

⁵⁷383 N.E.2d 290 (Ind. 1978).

⁵⁸IND. CODE §§ 23-1-1-1 to -12-4 (1976 & Supp. 1979).

⁵⁹*Id.* §§ 23-1-13-1 to -11 (1976) (General Professional); *id.* §§ 23-1-13.5-1 to -6 (1976) (Professional Accounting); *id.* §§ 23-1-14-1 to -21 (1976 & Supp. 1979) (Professional Medical); *id.* §§ 23-1-15-1 to -21 (1976) (Professional Dental).

⁶⁰*Id.* § 34-1-60-1 (1976).

⁶¹383 N.E.2d at 293.

⁶²*Id.* at 291.

⁶³Although it is not indicated in the opinion, presumably the relator appeared by counsel in moving to dismiss.

by counsel, filed a motion to set aside the default judgment and an alternative motion for an order requiring Remove All to appear through legal counsel or have the action dismissed. Both motions were overruled. The relator then petitioned the supreme court to issue the alternative writ of mandate and prohibition. The reported decision made permanent the temporary writ granted by the court.⁶⁴

The issue before the court was the validity of the 1976 amendment to the Indiana Code of Civil Procedure excepting cases in which a corporation was involved in an action brought in small claims court from the general rule that a corporation must appear in court through counsel.⁶⁵ Justly protective of the constitutional mandate giving the court original jurisdiction to determine the qualifications for admissions and practice of law,⁶⁶ the court held that the statutory provision purportedly allowing corporations to appear by nonattorneys was in conflict with the rules governing the qualifications precedent to the practice of law in Indiana and thus was without force or effect.⁶⁷ The basis of this position was, of course, the doctrine of separation of powers.⁶⁸

After rejecting the authority of the legislature to authorize lay persons to represent corporations in small claims proceedings, the court proceeded to determine whether under its rules a nonattorney could represent a corporation. The court noted that although some rules of small claims courts provide that a party "may appear either in person or by attorney,"⁶⁹ the rules are silent about whether a corporation may appear by an agent who is not a licensed attorney. The court cited a number of decisions from other jurisdictions, particularly Illinois, as establishing the rule that the agent representing the corporation must be an attorney.⁷⁰ The court also noted that

⁶⁴383 N.E.2d at 293.

⁶⁵See Act of Feb. 26, 1976, Pub. L. No. 132, § 44, 1976 Ind. Acts 655 (codified at IND. CODE § 34-1-60-1 (1976)).

⁶⁶IND. CONST. art. 7, § 4. See also IND. R. APP. P. 4(A)(1)-(3); IND. R. ADMISSIONS & DISCIPLINE, 3, 24.

⁶⁷383 N.E.2d at 293. See IND. CODE § 34-5-2-1 (1976); *In re Public Laws Nos. 305 & 309*, 263 Ind. 506, 334 N.E.2d 659 (1975); *State ex rel. Blood v. Gibson Circuit Court*, 239 Ind. 394, 157 N.E.2d 475 (1959).

⁶⁸383 N.E.2d at 292 (citing *State ex rel. Indiana State Bar Ass'n v. Moritz*, 244 Ind. 156, 191 N.E.2d 21 (1963)).

⁶⁹383 N.E.2d at 292. See, e.g., IND. R. SM. CL. 2(B)(5).

⁷⁰383 N.E.2d at 292 (citing *SEC v. Research Automation Corp.*, 521 F.2d 585 (2d Cir. 1975); *James v. Daley & Lewis*, 406 F. Supp. 645 (D. Del. 1976); *Nicholson Supply Co. v. First Fed. Sav. & Loan Ass'n*, 184 So. 2d 438 (Fla. Dist. Ct. App. 1976); *National Bank of Austin v. First Wis. Nat'l Bank*, 53 Ill. App. 3d 482, 368 N.E.2d 119 (1977); *Tom Edwards Chevrolet, Inc. v. Air-Cel, Inc.*, 13 Ill. App. 3d 378, 300 N.E.2d 312 (1973); *Remole Soil Serv., Inc. v. Benson*, 68 Ill. App. 2d 234, 215 N.E.2d 678 (1966)). Cf. *Johnson v. Pistakee Highlands Community Ass'n*, 390 N.E.2d 640 (Ill. App. Ct. 1979) (corporate officer's preparation of claim did not constitute practice of law). In *National*

some jurisdictions have expressly extended the rule to small claims court.⁷¹ Interestingly, the court did not cite its own decision in *State Bank v. Bell*,⁷² which contained dictum that a corporation must appear by an attorney.⁷³ Nor did it cite *Jefferson Park Realty Corp. v. Kelley, Glover & Vale*,⁷⁴ in which it was held that in the context of service and appearance the term "attorney" meant any person authorized to appear and represent a party to an action.⁷⁵ The court also held that when an officer of a corporation on whom service might be made waived issuance and service of summons to a complaint and filed an answer and general denial, the trial court had jurisdiction over the corporation and the resulting judgment was binding on the corporation.⁷⁶

The *Western Parks* court reasoned that a corporation should not be permitted to appear by "itself" even though an individual may do so if he or she pleases. The court further reasoned that the individual appearing pro se has a personal stake in the outcome of the litigation as both a party litigant and as an individual. A corporation, however, cannot be identified entirely with any one individual because the corporation is an independent legal entity separate and apart from its shareholders, officers, and agents. Thus, any agent representing the corporation would have only an indirect stake in the law suit.⁷⁷

The court was clearly concerned that confusion may arise when a corporation appears and is represented by several agents at different stages of the proceedings, as was the case with the plaintiff in *Western Parks*. The court asserted that a lack of legal expertise

Bank of Austin, the issue was whether a partner could represent a partnership in court. The court held that the partner could not because a lay agent cannot appear for a principal. 53 Ill. App. 3d at 489, 368 N.E.2d at 125.

⁷¹383 N.E.2d at 292 (citing *Tom Edwards Chevrolet, Inc. v. Air-Cel, Inc.*, 13 Ill. App. 3d 378, 300 N.E.2d 312 (1973)). See also *Tuttle v. Hi-Land Dairyman's Ass'n*, 10 Utah 2d 195, 350 P.2d 616 (1960).

⁷²5 Blackf. 127 (Ind. 1839).

⁷³*Id.*

⁷⁴105 Ind. App. 313, 12 N.E.2d 977 (1938).

⁷⁵*Id.* at 321, 12 N.E.2d at 981.

⁷⁶*Id.* at 322, 12 N.E.2d at 981.

⁷⁷See *Madding v. Indiana Dept. of State Revenue*, 149 Ind. App. 74, 270 N.E.2d 771 (1971). See generally H. HENN, *supra* note 19, § 78. This is always theoretically the case, but the proposition may be questioned because the small corporation with one director who is "in fact" the corporation is such a commonplace occurrence. Of course, the court has to think in terms of all corporations and not just the one-person corporation. It might be difficult to formulate a rule permitting the small, solely-owned corporation to appear by the person who owns and controls it while requiring the large corporation to appear by counsel. The problem is not as pronounced with the one-person corporation or the giant corporation, but with corporations having two or three principals, the identity of interest is not as clear.

by these persons "combined with a failure to maintain a proper chain of communication"⁷⁸ might frustrate the judicial process. To be sure, problems can arise even when different attorneys who are members of the same law firm appear for a corporation at various stages in a judicial proceeding, but the likelihood of problems occurring is, or should be, much less in this situation if the attorneys are true professionals. There is little doubt that lay persons representing corporations can disrupt the judicial process.⁷⁹

In two recent cases courts in other jurisdictions have reversed condemnation awards in favor of corporations represented by nonattorneys because the lack of legal expertise of the nonattorneys resulted in the improper admission of evidence.⁸⁰ These cases were not cited in *Western Parks*, but they support the court's proposition that the nonattorney representative of a corporation can "frustrate the continuity, clarity and adversity which the judicial process demands."⁸¹ Because sizable condemnation rewards were reversed, these two decisions are somewhat embarrassing to attorneys. In effect, the appellate courts were telling the defendant landowners that they should have been represented by attorneys whose legal training, skills, and expertise would have resulted in smaller judgments for the taking of their property.

The decisions holding that a corporation must appear by an attorney in small claims courts are not unanimous. In *Dixon v. Reliable Loans, Inc.*,⁸² the Georgia Court of Appeals, recognizing the intent behind the Georgia statute concerning the practice of law, held that a corporation could sue without an attorney.⁸³ In *Brooks v. Small Claims Court*,⁸⁴ the California Supreme Court held that corporations can appear without an attorney in the California small claims courts.⁸⁵ The court noted that the poor and unexperienced litigant would still be at a disadvantage against a skilled corporate representative if the provision designed to aid the poor litigant and provide equality for all small claims litigants keeps him from obtaining counsel.⁸⁶

⁷⁸383 N.E.2d at 293.

⁷⁹Of course, this is also true when individuals represent themselves, but then that is an individual's right.

⁸⁰*City of DeKalb v. Nehring Elec. Works, Inc.*, 40 Ill. App. 3d 726, 353 N.E.2d 150 (1976); *City of Akron v. Hardgrove Enterprises, Inc.*, 47 Ohio App. 2d 196, 353 N.E.2d 628 (1973).

⁸¹383 N.E.2d at 293.

⁸²112 Ga. App. 618, 145 S.E.2d 771 (1965).

⁸³*Id.* at 620, 145 S.E.2d at 772.

⁸⁴8 Cal. 3d 661, 504 P.2d 1249, 105 Cal. Rptr. 785 (1973).

⁸⁵*Id.* at 669, 504 P.2d at 1254, 105 Cal. Rptr. at 790.

⁸⁶*Id.*, 504 P.2d at 1254-55, 105 Cal. Rptr. at 790-91.

The result reached in *Western Parks*, that corporations must be represented by licensed attorneys in small claims courts, is certainly defensible as an abstract matter, although there are arguments in favor of eliminating the requirement in small claims courts, which are intended to be simple and uncomplicated mechanisms for resolving small disputes.⁸⁷ It is doubtful, however, that *Western Parks* was the right case for such a determination. Arguably, *Western Parks* had waived any objection to nonattorneys appearing and representing Remove All. *Western Parks* no doubt was represented by an attorney at the outset of the proceedings and when *Western Parks* filed its motion to dismiss for improper venue, no objection to a nonattorney representing the corporation was raised. In fact, *Western Parks* did not raise the objection until after the default judgment had been entered.⁸⁸ The appropriate time to have raised the objection was at the outset of the proceeding, not after the plaintiff had proceeded with its case. In Indiana, want of jurisdiction can be waived by a party failing to make a timely and specific objection,⁸⁹ and *Western Parks* was an appropriate case to apply that reasoning. This proposition is indirectly supported by decisions such as *Jefferson Park Realty*, holding that corporations which have proceeded to trial without being represented by an attorney are bound by adverse judgments.⁹⁰

The court in *Western Parks* cited and relied on the Illinois decision in *Tom Edwards Chevrolet, Inc. v. Air-Cel, Inc.*⁹¹ In *Edwards*, the defendant Air-Cel filed a motion to allow the corporation to be represented by its president and minority shareholder, who was not a licensed attorney. The motion was denied and a default judgment entered. The judgment was affirmed on appeal with the court holding that Air-Cel had to be represented by an attorney.⁹² Just as Air-Cel was bound by its decision to proceed without an attorney, *Western Parks* should have been bound when it filed its motion to dismiss because it failed to object that the complaint was not filed by an attorney. In *Nicholson Supply Co. v. First Federal Savings &*

⁸⁷In this respect, the supreme court might be well advised to adopt a rule permitting corporations to appear by nonattorneys in small claims proceedings.

⁸⁸If *Western Parks*, a corporation, was not represented by an attorney at the outset, the claim for a waiver is even stronger.

⁸⁹IND. R. TR. P. 12(A). See *Pittsburgh C., C. & St. L. Ry. v. Gregg*, 181 Ind. 42, 102 N.E. 961 (1913).

⁹⁰105 Ind. App. 313, 322, 12 N.E.2d 977, 981 (1938). Other cases holding corporations represented by nonattorneys bound by adverse results are: *Jardine Estates, Inc. v. Koppel*, 24 N.J. 536, 133 A.2d 1 (1957); *Cohn v. Warschauer Sick Support Soc'y Bnei Israel*, 19 N.Y.S.2d 742 (Sup. Ct. 1940); *Phoenix Mut. Life Ins. Co. v. Radcliffe on the Delaware, Inc.*, 439 Pa. 159, 266 A.2d 698 (1970).

⁹¹13 Ill. App. 3d 378, 300 N.E.2d 312 (1973), cited in 383 N.E.2d at 292.

⁹²13 Ill. App. 3d at 378-79, 300 N.E.2d at 312-13.

Loan Association,⁹³ which the court also relied on, a complaint signed by the president of a corporation was stricken and held a nullity.⁹⁴ Consequently, the complaint could not have been amended after the time for foreclosing a lien had lapsed by substituting an attorney's signature for that of the president. Again, it is noteworthy that the objection was raised at the outset of the proceeding.

Western Parks is the only decision discovered that has permitted a party represented by an attorney to challenge a judgment for the first time after the judgment has been rendered because the prevailing corporation did not appear by an attorney. The closest decision is *City of Akron v. Hardgrove Enterprises*,⁹⁵ in which the trial court permitted a lay person to represent the defendant over the city's objection. Under these circumstances, it would be unfair to penalize the city for going ahead with the proceeding after the court allowed the lay representation. That reasoning is more understandable than permitting the losing party to raise the issue after judgment has been entered, even if judgment is by default.⁹⁶

Perhaps the Indiana Supreme Court felt that *Western Parks* might be the only opportunity to establish the proposition that corporations must be represented by attorneys, even in small claims proceedings. The case was not really a proper vehicle for that determination, however, and the court probably would have been better advised to have vacated the alternative writ of mandate and prohibition instead of making it permanent, because *Western Parks* had waived any objection to lay persons appearing and proceeding for Remove All.

C. Closely Held Corporations

The proposition that Indiana courts are willing to recognize the unique nature of the closely held corporation was strengthened by the decision in *Cressy v. Shannon Continental Corp.*⁹⁷ The *Cressy* court held that the lower court correctly invoked its equity power to

⁹³184 So. 2d 438 (Fla. Dist. Ct. App. 1976), cited in 383 N.E.2d at 292.

⁹⁴*Id.* at 442.

⁹⁵353 N.E.2d 628 (Ohio Ct. App. 1976).

⁹⁶See also *City of DeKalb v. Nehring Elec. Works, Inc.*, 40 Ill. App. 3d 726, 353 N.E.2d 150 (1976).

⁹⁷378 N.E.2d 941 (Ind. Ct. App. 1978). In *Motor Dispatch, Inc. v. Buggie*, 379 N.E.2d 543 (Ind. Ct. App. 1978), the court of appeals also recognized that a fiduciary in a closely held corporation must deal "fairly, honestly and openly with the corporation and his fellow shareholders and must not be distracted from the performance of official duties by personal interest." *Id.* at 547. In *Motor Dispatch*, however, there was no evidence that the defendant had done anything injurious to the financial interest of the corporation or that he had failed to deal with his fellow shareholders fairly, honestly, and openly.

accomplish the intent of the principal shareholders in organizing Shannon,⁹⁸ but the court reversed and remanded on the issue of the appropriate relief.⁹⁹

Cressy involved challenges to the validity of certain share transactions made by each of the principal shareholders of Shannon which altered control of the corporation. Cressy and Russell, the principal shareholders, had each subscribed to and received 425 of the 1,000 common shares authorized by the articles of incorporation. The dispute involved some of the remaining 150 authorized shares.

The affairs of the corporation did not prosper,¹⁰⁰ and the board of directors eventually adopted a resolution authorizing Russell to borrow money for the corporation and to sell additional authorized but unissued shares if the money could not be borrowed. Cressy testified that he knew shares could be sold, but that he did not know how many or when shares would be sold or that Russell contemplated selling thirty shares to his parents. The effect of this transaction was to give Russell ownership or control of 455 shares. Cressy challenged this transaction. Russell in turn challenged Cressy's purchase of seventy-five Shannon shares from Shannon's treasurer and accountant.¹⁰¹ Cressy had not notified Russell or the other shareholders of that purchase.

The litigation arose when Cressy was unable to transfer these shares into his name. He filed two suits: the first sought to compel the transfer of the shares to his name, and the second sought to set aside the sale of the thirty shares to Russell's parents. Russell counterclaimed, asserting that Cressy's shares were issued without consideration, that the treasurer's shares were issued without consideration, and that Cressy's purchase of those shares violated an agreement between the treasurer and Russell.

The trial court concluded that Cressy and Russell had intended to be "equal partners" when forming Shannon and that the court should invoke its equity jurisdiction to secure such an intent. Hence, the trial court entered an order amending Shannon's articles of incorporation to establish a second class of shares, which did not possess voting rights but which were identical to the shares described in the articles of incorporation in all other respects.¹⁰² The thirty shares owned by Russell's parents and the seventy-five shares

⁹⁸378 N.E.2d at 945.

⁹⁹*Id.*

¹⁰⁰The two principals made personal loans to Shannon to help it meet its financial obligations and with their wives, personally guaranteed a loan received by the corporation.

¹⁰¹The remaining shares had been issued to other individuals.

¹⁰²The decree declared the amendment and ordered the secretary of state to reflect it in his records. 378 N.E.2d at 944 n.5.

Cressy had acquired from the treasurer were then declared to be nonvoting shares of the second class. The end result was that Cressy and Russell were again in a position of equality with 425 voting shares each. Only Cressy appealed from the judgment.¹⁰³

Cressy first challenged the ability of the court to recognize an "incorporated partnership." The court of appeals rejected this contention,¹⁰⁴ relying on *Hartung v. Architects Hartung/Odle/Burke, Inc.*,¹⁰⁵ which recognized that shareholders of closely held corporations owe a fiduciary duty to each other to deal fairly, honestly, and openly when the parties plan to run the enterprise in a manner akin to a partnership rather than strictly adhering to the traditional corporate norm.¹⁰⁶

Thus, the *Cressy* court places Indiana among those jurisdictions which have concluded that the statutory norm imposed by a general corporation act is not inflexible and can be varied by the principals of the corporation. The court accepts the reality that, although persons incorporate to obtain the various benefits afforded by the corporate form of enterprise, "they often expect to act and to be treated as partners in their dealings among themselves."¹⁰⁷ The premise is simple—when the principals of a corporation do not intend to follow the corporate norm and no harm results to outsiders thereby, there is no reason to frustrate the parties' intent.¹⁰⁸ The

¹⁰³Pursuant to IND. R. TR. P. 52(D), the decision of the trial court was treated as made on a general finding because no special findings were requested. See *Arnette v. Helvie*, 148 Ind. App. 476, 267 N.E.2d 864 (1971). Consequently, the standard of review on factual issues was the standard applicable to jury verdicts: a judgment should be affirmed if it is correct on any theory of law applicable to the evidence. See *In re Estate of Fanning*, 263 Ind. 414, 333 N.E.2d 80 (1975); *Notter v. Beasley*, 240 Ind. 631, 166 N.E.2d 643 (1960).

¹⁰⁴378 N.E.2d at 945.

¹⁰⁵157 Ind. App. 546, 301 N.E.2d 240 (1973), discussed in Galanti, *Business Associations*, 1974 *Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 24, 42-46 (1974).

¹⁰⁶157 Ind. App. at 552, 301 N.E.2d at 243. The court concluded that the evidence sustained the finding that Cressy and Russell intended equal ownership and control of the business and that each had breached the concomitant duty of disclosing the availability of outstanding shares and giving the other the chance to participate in the purchase of the shares. 378 N.E.2d at 945. See generally Brudney, *Fiduciary Ideology in Transactions Affecting Corporate Control*, 65 MICH. L. REV. 259, 289-94 (1966).

¹⁰⁷378 N.E.2d at 945. The court correctly noted that not all corporations with few shareholders operate informally because the shareholders may well intend to operate the corporation strictly in accordance with the corporate norm to both the world-at-large and among themselves. *Id.* n.6. In other words, the court recognized that the intent of the parties was to control and that this intent would be recognized whether it was to follow or depart from the corporate norm.

¹⁰⁸See generally Conway, *The New York Fiduciary Concept in Incorporated Partnerships and Joint Ventures*, 30 FORDHAM L. REV. 297, 309-11 (1962); Hornstein, *Judicial Tolerance of the Incorporated Partnership*, 18 L. & CONTEMP. PROB. 435 (1952). Both articles were cited by the court. 378 N.E.2d at 945.

issue often arises in cases involving formal agreements restricting the discretion of the board of directors of a corporation.¹⁰⁹ There is no reason, however, for a written agreement to be required, and a court of equity should clearly have the authority to give effect to the intention of the parties even when it is not reflected in a written document.¹¹⁰

In addition to relying on *Hartung* in determining that Indiana recognizes the incorporated partnership, the *Cressy* court also cited the leading case of *Helms v. Duckworth*,¹¹¹ in which Judge Burger, now the Chief Justice of the United States Supreme Court, concluded that in intimate business ventures in which there is no division between the shareholder-owners and the director-managers of the corporation, the shareholders would bear the relation of trust and confidence to each other which prevails in partnerships.¹¹² The attitude taken by the *Cressy* court certainly cannot be faulted. Rather, it should be commended because it recognizes the considerable difference between the large publicly held corporation, for which the strictures of the corporation act are necessary to protect the interests of shareholders who are not actively involved in the running of the corporation, and the small corporation, in which the principals *in fact* operate the enterprise as if it were a partnership.

The only objection to *Cressy* is the court's statement that "the imposition of such duties as the term 'incorporated partnership' implies is a recognition that this form of business enterprise is a hybrid."¹¹³ Unfortunately, this statement can lead to the supposition that there is some intermediate form of enterprise between the partnership and the corporation. This supposition is not true. The corporation involved in *Cressy* was in fact a corporation—it was not a partnership. To maintain its status as a corporation, the corporation had to satisfy the requirements of the Indiana Act. Furthermore, if the parties had ignored corporate formalities and had treated the enterprise as a partnership, they could well have lost the right to limited liability if a court had decided to "pierce the corporate veil."¹¹⁴ A more accurate description of the status of Shannon

¹⁰⁹See, e.g., *Galler v. Galler*, 32 Ill. 2d 16, 203 N.E.2d 577 (1964). Compare *McQuade v. Stoneham*, 263 N.Y. 323, 189 N.E. 234 (1934), with *Clark v. Dodge*, 269 N.Y. 410, 199 N.E. 641 (1936).

¹¹⁰See, e.g., *Donahue v. Rodd Electrotpe Co.*, 367 Mass. 578, 328 N.E.2d 505 (1975). But see *Zidell v. Zidell, Inc.*, 277 Or. 423, 560 P.2d 1091 (1977).

¹¹¹249 F.2d 482 (D.C. Cir. 1957), cited in 378 N.E.2d at 945.

¹¹²249 F.2d at 486.

¹¹³378 N.E.2d at 945.

¹¹⁴Cf. *Edward Shoes, Inc. v. Orenstein*, 333 F. Supp. 39 (N.D. Ind. 1971) (defendant shareholder not liable for corporate debtor's liabilities incurred after the articles of incorporation revoked in the absence of allegations that the defendant acted knowingly, wilfully, or with the intent to defraud in incurring the liabilities on the corporation's

is that it was analogous to a partnership that had been incorporated. This would recognize the right of the parties to operate the enterprise to some extent as they saw fit while reemphasizing that it was in fact a corporation.

Furthermore, the unqualified use of the term "incorporated partnership" would seem to ignore the established principle that an action by the principals directly contravening a requirement of a corporation law is ineffective.¹¹⁵ Although this position can be criticized,¹¹⁶ it does recognize that in adopting a corporation act the legislature has spoken, and thus parties cannot ignore it entirely.¹¹⁷

Cressy acknowledges the overriding impact of the Indiana Act in holding that the trial court erred in amending Shannon's articles of incorporation to provide for a new class of nonvoting shares.¹¹⁸ The court noted that the only decisions discussing whether a court's equity powers could give it authority to order amendments to articles of incorporation have held that the courts do not have such authority.¹¹⁹ The court concluded that, unless a statute exists which specifically authorizes a court to order amendments, the procedure for amending articles as set forth in the Indiana Act¹²⁰ must be followed.¹²¹ Of course, the court was noting that the legislature had not granted the court authority to amend articles, but indirectly, the court was acknowledging the ultimate authority of the legislature to determine the manner in which corporations are operated.

Cressy's contention that the shares issued to Russell's parents should have been invalidated because the meeting at which the sale was authorized was improperly called and Cressy's additional contention that he had not been afforded his preemptive rights, were also rejected by the court.¹²² The court, in effect, treated the issue as one of waiver because Cressy was present at the meeting in which Russell was authorized to sell the shares and raised no objection.

behalf). For a general discussion of when the "corporate veil" will be pierced, see H. HENN, *supra* note 19, § 146-149; 1, 2 G. HORNSTEIN, *supra* note 19, §§ 31, at 751-59; Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979 (1971).

¹¹⁵*Somers v. AAA Temporary Servs., Inc.*, 5 Ill. App. 3d 931, 284 N.E.2d 462 (1972).

¹¹⁶*See* R. HAMILTON, CORPORATIONS 437-38 (1976).

¹¹⁷*See generally* Bradley, *Toward a More Perfect Close Corporation—The Need for More and Improved Legislation*, 54 GEO. L.J. 1145 (1966).

¹¹⁸378 N.E.2d at 946.

¹¹⁹*Id.* Disabled Am. Veterans v. Hendrixson, 9 Utah 2d 152, 340 P.2d 416 (1959); Casper v. Kalt-Zimmer Mfg. Co., 159 Wis. 517, 149 N.W. 754 (1914). *See generally* 7A W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 3716 (perm. ed. 1978).

¹²⁰IND. CODE §§ 23-1-4-1 to -7 (1976).

¹²¹378 N.E.2d at 946.

¹²²*Id.*

Hence, Cressy was precluded from asserting either a claim for preemptive rights to the shares or objecting to technical deficiency in the meeting.¹²³

The court observed that the trial court could have required Cressy and Russell "to exercise their voting rights consistent with their obligations"¹²⁴ or could have ordered the sale by the corporation of an equalizing number of shares, instead of exceeding its authority by attempting to amend the articles. Unfortunately, the latter remedy of a forced sale would have presented a problem, because at the time of the trial Shannon's 1,000 authorized shares had been issued and the only way additional shares could be issued would have been to amend the articles of incorporation. It would seem possible, however, that the court, by exercising its equity jurisdiction, could have ordered Cressy and Russell to take the steps necessary to amend Shannon's articles of incorporation to carry out their intended understanding themselves, doing indirectly what the court could not do directly.¹²⁵

D. Merger of Not-For-Profit Corporations

An interesting but questionable case involving the merger procedures for not-for-profit corporations was decided during the survey period. In *Knightstown Lake Property Owners Association v. Big Blue River Conservancy District*,¹²⁶ the court of appeals affirmed a decision in a condemnation proceeding holding that Pioneer Village Lot Owners Association, an Indiana not-for-profit corporation, had no interest in land being condemned by the Big Blue River Conservancy District.¹²⁷

In 1924 the property in question was conveyed to the Knightstown Lake Property Owners Association, also a not-for-profit corporation.¹²⁸ All the owners of lots in the Knightstown Lake subdivision were members of Knightstown Lake. Knightstown Lake apparently maintained its corporate existence from 1924 until 1932,

¹²³See *Jones v. Milton & Rushville Turnpike Co.*, 7 Ind. 547 (1856); 18 AM. JUR. 2d *Corporations* § 251 (1965). The court did not decide whether denying voting rights to Russell's parents was improper because they had not assigned any errors.

¹²⁴378 N.E.2d at 946.

¹²⁵See *Weil v. Beresth*, 154 Conn. 12, 220 A.2d 456 (1966).

¹²⁶383 N.E.2d 361 (Ind. Ct. App. 1978). For another discussion of this case, see Falender, *Property*, 1979 *Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 343, 351-54 (1980).

¹²⁷383 N.E.2d at 367. The property in question consisted of public spaces conveyed to a property owners association with the expectation that the property would be conveyed to a municipal corporation if the subdivision ever became a municipality. This condition had not occurred.

¹²⁸Knightstown Lake presumably was incorporated under the Indiana Voluntary Association Act of 1901, ch. 127, 1901 Ind. Acts 289 (repealed 1929).

but there was no evidence that it acted in any corporate capacity, other than to pay taxes on the property, from 1932 until 1965. Pioneer was organized in 1965, and paid the taxes on the property thereafter. The trial court rejected Pioneer's contention that it owned the property and held that the property, which had been originally conveyed to Knightstown Lake, passed to the lot owners who were the ultimate beneficiaries of the conveyance when the association ceased to exist. The court of appeals affirmed.¹²⁹ Starting with the premise that an appellate court will not weigh conflicting evidence,¹³⁰ the court concluded that Pioneer had not sustained the burden of asserting title to or showing an equitable interest in the property.¹³¹ Consequently, Pioneer had no interest in the property other than reimbursement for the taxes it had paid.

Pioneer contended that it was a successor to Knightstown Lake on the basis of either a 1976 statutory merger or a 1965 de facto merger that occurred when Pioneer was organized and undertook to pay the taxes. The *Knightstown* court rejected the first argument, holding that the right to and procedures for merging not-for-profit corporations were governed by statute and that there was no evidence the two organizations had complied with the statutory requirements.¹³² There was no proof that the persons acting as officers of Knightstown Lake, who purportedly carried out the merger, had been duly elected; no annual reports had been filed with the secretary of state with the exception of a "composite" report for activities from 1971 to 1975. In fact, it would appear that Knightstown Lake had ceased to exist for failing to file annual reports long before 1976.¹³³ Thus, even if the original members of Knightstown Lake or their successors had attempted to elect officers and effectuate a merger, the entity itself no longer existed.

The court of appeals also rejected the contention that there had been a de facto merger of Knightstown Lake and Pioneer in 1965 because the organizations had failed to demonstrate compliance with the statute.¹³⁴ Unfortunately, this seems to be a misunderstanding of the de facto merger doctrine. The usual de facto merger involves a

¹²⁹383 N.E.2d at 368.

¹³⁰*Id.* at 365. See *State ex rel. Roberts v. Graham*, 231 Ind. 680, 110 N.E.2d 855 (1953).

¹³¹383 N.E.2d at 366-67. See *Aircraft Acceptance Corp. v. Jolly*, 141 Ind. App. 515, 518, 230 N.E.2d 446, 449 (1967) (citing 73 C.J.S. *Property* § 17 (1951)).

¹³²383 N.E.2d at 366-67. See generally *H. HENN, supra* note 19, § 346; 1 G. HORNSTEIN, *supra* note 19, § 362, at 470-71.

¹³³Knightstown Lake had been obligated to file annual reports since 1949, and failure to do so was grounds for forfeiture of its articles. See IND. CODE §§ 23-3-6-1 to -3 (1976).

¹³⁴383 N.E.2d at 366-67.

corporate reorganization not originally structured as a merger, which a court determines to be a merger *in fact* for purposes of the right of shareholders to dissent and receive the appraised value of their shares.¹³⁵ Application of the doctrine is also appropriate when there has been a good faith attempt to follow the statutory merger procedures which falls short of the requirements.¹³⁶ It is at least arguable that the *Knightstown* court could have found that Pioneer was the legal successor to Knightstown Lake. Apparently, in 1965 persons directly interested in the subdivision had attempted to form a successor organization to Knightstown Lake to control the public spaces of the subdivision. Although the effort was not as thorough as required, it would appear that the attempt was close enough to have justified the court holding in favor of Pioneer.

Certainly, Pioneer had the burden of proving title, but by holding that Pioneer failed to sustain the burden, the court produced the anomalous result that the organization created by the landowners to take control of the common spaces in the subdivision had no title or interest in the property. The unfortunate consequence of this conclusion is that Pioneer was entitled to be reimbursed by its own members for the taxes it had paid. The members were entitled to receive the proceeds of the condemnation proceeding, but the court did not indicate how the proceeds should be divided. As a purely practical matter, a decision in favor of Pioneer would have expedited the distribution of the award.

E. Agent's Liability

The result in *Brown v. Owen Litho Service, Inc.*¹³⁷ vividly illustrates the consequences of an agent's carelessness in conducting business on behalf of his principal and indirectly describes the consequences of careless operation of a corporate enterprise. In *Brown*, the court of appeals affirmed a judgment that Brown, as an individual, was liable for what he claimed to be the debts of J.J. Brown Publishing, Inc.¹³⁸ The dispute was over payment of Owen

¹³⁵See, e.g., *Farris v. Glen Alden Corp.*, 393 Pa. 427, 143 A.2d 25 (1958). See generally H. HENN, *supra* note 19, § 349, at 725-26.

¹³⁶See *John Mohr & Sons v. Apex Terminal Warehouses, Inc.*, 422 F.2d 638 (7th Cir. 1970); *Smith v. Cleveland, C., C. & St. L. Ry.*, 170 Ind. 382, 81 N.E. 501 (1907). See generally 15 W. FLETCHER, *supra* note 119, §§ 7152-7155. This aspect of the *de facto merger* doctrine is similar to the *de facto corporation* doctrine, which arises when an attempt to organize a corporation falls short of the procedures mandated by the applicable corporation act, but is substantial enough to justify the conclusion that a corporation exists for all purposes except when challenged by the state. See generally H. HENN, *supra* note 19, § 140; 1 G. HORNSTEIN, *supra* note 19, §§ 27-30.

¹³⁷384 N.E.2d 1132 (Ind. Ct. App. 1979).

¹³⁸*Id.* at 1136. The actual nature of the corporation is unclear. The court mentioned that the corporation was "apparently" organized as a not-for-profit corporation, *id.* at

Litho's charges for printing a magazine published by Brown. Brown contended that he incurred the debts while acting as an officer and agent of the corporation and therefore should be absolved from personal liability.¹³⁹

An established principle of agency law is that an agent normally is not liable for the debts of his principal.¹⁴⁰ The issue before the court, however, was whether Brown had met the burden of establishing that he had disclosed the agency relationship and the existence and identity of the principal to Owen Litho.¹⁴¹ The court of appeals concluded that Brown had not sustained his burden despite his contention, contrary to the testimony of an Owen Litho sales representative, that he had made full disclosure before the printing agreement was reached.¹⁴² Brown realized that the trial court was free to disbelieve his testimony,¹⁴³ and so he attempted to rely on three pieces of documentary evidence to establish disclosure as a matter of law.

The first two documents were checks which were imprinted with the name of the corporation and were drawn on its account. The checks were signed by Brown and another officer of the corporation. The court discounted this evidence because the face of the checks did not indicate the capacity in which the signators signed. Arguably, the court was wrong on this point because the important factor under agency law is whether the persons were *authorized* to sign the checks.¹⁴⁴ Indication of the signators' capacities on the check is of little significance as proof of a disclosed principal.¹⁴⁵ However, the conclusion in this instance that the checks did not give notice to Owen Litho of the agency relationship appears well founded. The issue in *Brown* was Owen Litho's awareness of the relationship at the time of the transaction. The court followed the general and preferred view that disclosure of the previously undisclosed principal after the contract has been executed has no bearing on the relationship created between the agent and the third party at the

1134, but because it appears to have been intended as a profit-making venture, organization under the Indiana Not-For-Profit Corporation Act would not have been appropriate. See IND. CODE § 23-7-1.1-2(d) (1976).

¹³⁹384 N.E.2d at 1133. The opinion does not indicate whether the corporation itself was held liable. Presumably, it was but the corporation probably had no assets.

¹⁴⁰RESTATEMENT (SECOND) OF AGENCY §§ 320-322 (1957).

¹⁴¹384 N.E.2d at 1133-34. See *Vawter v. Baker*, 23 Ind. 63 (1864). See also RESTATEMENT (SECOND) OF AGENCY § 320, Comment b (1957).

¹⁴²384 N.E.2d at 1136.

¹⁴³*Id.* at 1134. See *Neel v. Cass County Fair Ass'n*, 143 Ind. App. 339, 240 N.E.2d 546 (1968).

¹⁴⁴RESTATEMENT (SECOND) OF AGENCY § 76 (1957).

¹⁴⁵*Id.* §§ 26-27. The failure to designate the representative capacity can be significant, however, under the Uniform Commercial Code. See IND. CODE § 26-1-3-403 (1976).

time of the transaction; thus, the subsequent disclosure will not relieve the agent from personal liability on the contract.¹⁴⁶

The *Brown* court was particularly persuaded by decisions from other jurisdictions holding that the existence of checks drawn on a corporate account, standing alone, is insufficient to disclose an agency relationship and the existence and identity of the principal.¹⁴⁷ The court did acknowledge *Potter v. Chaney*,¹⁴⁸ however, in which it was held that the defendant had fully revealed his agency because the corporate principal had existed at the time of the transactions and the checks paying for goods were always signed by the defendant as president of the corporation and were drawn on the corporate account.¹⁴⁹ The *Potter* transactions, however, occurred over a period of four years as contrasted with a period of less than six months in *Brown*. A court could rightly conclude that when a third party receives and negotiates checks drawn on a corporate account over a long period of time, he can be presumed to know of the corporation's existence and to know that he is in fact dealing with a corporation. This is not necessarily true when the period of time is short, as in *Brown*.¹⁵⁰

The third piece of documentary evidence relied on by Brown was a letter, signed in the name of the president and general manager of Owen Litho, that was addressed to the corporation. This letter was discounted because it was the only letter addressed to the corporation. The balance of Owen Litho's correspondence was addressed to Brown or to the magazine. Furthermore, although the letter bore the signature of the president and general manager, his secretary, who was authorized to write and sign such routine letters, had in fact signed it.¹⁵¹ The court of appeals concluded that the three documents could not support the inference that as a matter of

¹⁴⁶384 N.E.2d at 1135. The court cited and relied on *Myers-Leiber Sign Co. v. Wierich*, 2 Ariz. App. 534, 410 P.2d 491 (1966); *Olympic Elec. Serv., Inc. v. Craig*, 286 So. 2d 182 (La. Ct. of App. 1973); *Carter v. Walton*, 469 S.W.2d 462 (Tex. Ct. App. 1971).

¹⁴⁷384 N.E.2d at 1135-36 (citing *Diamond Match Co. v. Crute*, 145 Conn. 277, 141 A.2d 247 (1958); *Olympic Elec. Serv., Inc. v. Craig*, 286 So. 2d 182 (La. Ct. of App. 1973); *Darr v. Kinchen*, 176 So. 2d 638 (La. Ct. of App.), *cert. denied*, 248 La. 386, 178 So. 2d 664 (1965); *Giglio v. Lunsford*, 165 So. 2d 60 (La. Ct. of App. 1964); *Wilson v. McNabb*, 157 So. 2d 897 (La. Ct. of App. 1963)).

¹⁴⁸290 S.W.2d 44 (Ky. 1956), *noted in* 384 N.E.2d at 1136 n.5.

¹⁴⁹290 S.W.2d at 46.

¹⁵⁰The transactions in *Potter* "were on a day-by-day basis." *Id.* at 46. The problem, of course, is to draw the line between a few transactions in a short time period and many transactions over an extended time period.

¹⁵¹For a discussion of when notice to and knowledge of an agent will be imputed to the principal, see W. SEAVEY, AGENCY §§ 96-102 (1964); W. SELL, AGENCY §§ 86, 88-92 (1975).

law Owen Litho knew, or a reasonable person would have known, that Brown was acting as an agent for the corporation.¹⁵²

The lesson of *Brown* is painfully clear. A person acting for a principal, whether an individual or a corporation, who fails to disclose the capacity in which he acts and the existence and identity of the principal acts at his peril.¹⁵³ Although an undisclosed principal is liable for obligations incurred on his behalf by the agent,¹⁵⁴ the agent is jointly liable with the principal and the third party may choose which party to pursue for the obligation.¹⁵⁵

As the court noted, to avoid personal liability, an agent is obligated to disclose the existence and identity of the principal.¹⁵⁶ The agent will not be relieved of this duty even when the third person had knowledge of facts and circumstances which, if pursued, would have disclosed the existence and identity of the principal.¹⁵⁷ The general rule is that an agent of a partially disclosed principal is bound on a contract,¹⁵⁸ and the agent is presumed to be a party in the absence of evidence otherwise.¹⁵⁹ In effect, the agent is obliged to give the third person actual knowledge of the existence and identity of the principal or provide that knowledge which to a reasonable person is equivalent to actual knowledge.¹⁶⁰ The nature of the relationship between the principal and the third party—fully disclosed, partially disclosed, or undisclosed—depends on the agent's representations and the third party's knowledge at the time of the transaction. These are factual issues to be determined by the circumstances surrounding the transaction.¹⁶¹

¹⁵²384 N.E.2d at 1136.

¹⁵³See *Polk v. Haworth*, 48 Ind. App. 32, 95 N.E. 332 (1911).

¹⁵⁴*Watteau v. Fenwick*, [1893] 1 Q.B. 346. See generally RESTATEMENT (SECOND) OF AGENCY § 186 (1957).

¹⁵⁵RESTATEMENT (SECOND) OF AGENCY § 337 (1957). Furthermore, even if Brown had disclosed the principal, the court correctly noted that he would be relieved of liability only for transactions subsequent to the disclosure. 384 N.E.2d at 1135. See *Revere Press, Inc. v. Blumberg*, 431 Pa. 370, 246 A.2d 407 (1968).

¹⁵⁶384 N.E.2d at 1135 (citing *Polk v. Haworth*, 48 Ind. App. 32, 95 N.E. 332 (1911)).

¹⁵⁷See *Orient Mid-East Lines v. Albert E. Bowen, Inc.*, 458 F.2d 572 (2d Cir. 1972) (construing New York law); *Vander Wagen Bros., Inc. v. Barnes*, 15 Ill. App. 3d 550, 304 N.E.2d 663 (1973); *Mawer-Gulden Annis, Inc. v. Brazilian & Columbian Coffee Co.*, 49 Ill. App. 2d 400, 199 N.E.2d 222 (1964).

¹⁵⁸See, e.g., *Hagen v. Brozowski*, 336 S.W.2d 213 (Tex. Ct. App. 1960). See generally W. SEAVEY, *supra* note 151, § 123, at 211-12; RESTATEMENT (SECOND) OF AGENCY § 321 (1957).

¹⁵⁹See authorities cited in W. SEAVEY, *supra* note 151, § 70E, at 123 n.2.

¹⁶⁰See *Howell v. Smith*, 261 N.C. 256, 260, 134 S.E.2d 381, 384 (1964).

¹⁶¹See *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334, 338 (1966); *Matsko v. Dally*, 49 Wash. 2d 370, 301 P.2d 1074, 1077 (1956). See also 3A W. FLETCHER, *supra* note 119, § 1133.

The *Brown* result is clearly correct. It might seem harsh because Brown probably believed, in good faith, that he was acting on behalf of and as an agent of the corporation. A person in Brown's position of "owning" the corporation might understandably refer to it as "his" business and not as a separate corporate entity. The court appropriately held Brown liable for the corporation's obligations, however, because he had failed to inform third persons that any obligations incurred were those of the corporation. In general, a third party is justified in holding an agent liable on a contract when that party thinks the agent is the only party to be bound, even if an undisclosed principal is also liable. Also, it would not have been appropriate to have held Owen Litho to the general standard that a third party, aware that a contract is to be made on behalf of a known principal, is obligated to determine the credit worthiness of the principal or suffer the consequences. Owen Litho was not aware that anyone but Brown was involved, and thus could not have been held responsible for determining the credit worthiness of a corporation which it did not know existed and which might not have been acceptable as a creditor if known.

F. Statutory Developments¹⁶²

1. *Business Takeover Act.*—The most significant legislative development during the survey period was Public Law 235, enacting a new Indiana Business Takeover Act¹⁶³ and repealing the old takeover act.¹⁶⁴ The new Act clearly was passed in response to the Fifth Circuit Court of Appeals decision in *Great Western United Corp. v. Kidwell*,¹⁶⁵ affirming a lower court decision¹⁶⁶ declaring the Idaho Business Takeover Act unconstitutional¹⁶⁷ because it was preempted by the Williams Act amendments to the 1934 Act¹⁶⁸ and was an impermissible burden on interstate commerce in violation of

¹⁶²The author wishes to express his appreciation to Christine Ratliff Lundquist for her assistance in preparing this section of the Survey.

¹⁶³Act of Apr. 6, 1979, Pub. L. No. 235, § 1, 1979 Ind. Acts 1122 (codified at IND. CODE §§ 23-2-3.1-1 to -11 (Supp. 1979)) [hereinafter referred to as the new Act].

¹⁶⁴Act of Apr. 6, 1979, Pub. L. No. 235, § 2, 1979 Ind. Acts 1129 (repealing IND. CODE §§ 23-2-3-1 to -12 (1976)) [hereinafter referred to as the old Act]. The old Act was discussed in Galanti, *Business Associations, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 33, 53-59 (1975) [hereinafter cited as *1975 Survey*], and Note, *The Indiana Business Takeover Act*, 51 IND. L.J. 1051 (1976).

¹⁶⁵577 F.2d 1256 (5th Cir. 1978), *rev'd on other ground sub nom.* Leroy v. Great W. United Corp., 47 U.S.L.W. 4844 (U.S. June 26, 1979).

¹⁶⁶*Great W. United Corp. v. Kidwell*, 439 F. Supp. 420 (N.D. Tex. 1978), *rev'd on other grounds, sub nom.* Leroy v. Great W. United Corp., 47 U.S.L.W. 4844 (U.S. June 26, 1979).

¹⁶⁷577 F.2d at 1286. The Idaho Business Takeover Act was codified at IDAHO CODE §§ 30-1501 to -1513 (Supp. 1977).

¹⁶⁸577 F.2d at 1281. See 15 U.S.C. §§ 78m(d)-(e), 78h(d)-(f) (1976).

the commerce clause.¹⁶⁹ Unfortunately, the *Great Western* litigation ended not with a bang but with a whimper. The Supreme Court, instead of deciding the case on the merits which would have resolved the status of the many state takeover statutes, reversed the Fifth Circuit on procedural grounds,¹⁷⁰ holding that venue to challenge the Idaho statute in the Northern District of Texas was improper.¹⁷¹ Justice Stevens, writing for the majority, concluded that section 28(a) of the 1934 Act¹⁷² did not impose a duty on Idaho securities officials, and consequently venue in the Texas court would not lie under section 27.¹⁷³ Although the interests of defendants must be considered in venue cases, the unfortunate consequence of the Court's decision is that a tender offeror wishing to challenge the constitutionality of a state takeover statute must do so within that state. As Justice White pointed out in his dissent, offerors might forego making tender offers rather than undertaking to attack a takeover act or defend an enforcement action in each state claiming jurisdiction.¹⁷⁴ The sheer logistics of attacking statutes in different states might be enough to discourage tender offers which, unfortunately, is often the main purpose of state takeover laws.

The old Act undoubtedly would have been invalid if *Great Western* had been affirmed. If the Supreme Court had reversed on the merits, the old Act might have passed constitutional muster, but this is now of academic interest only. The constitutionality of the new Act, however, has been upheld¹⁷⁵ without an in-depth discussion of the substantive issues raised in *Great Western*.¹⁷⁶

¹⁶⁹577 F.2d at 1286. See U.S. CONST. art. I, § 8, cl. 3. *Great Western* is not the only case challenging the constitutionality of business takeover acts. In *Uarco Inc. v. Daylin, Inc.*, No. 78-C-4246 (N.D. Ill., filed Oct. 30, 1978), the court preliminarily enjoined the Illinois Secretary of State from enforcing the Illinois Business Takeover Act (codified at ILL. ANN. STAT. ch. 121 1/2, §§ 137.51-70 (Smith-Hurd Supp. 1979)). The Illinois Act was also enjoined in *Mite Corp. v. Dixon*, No. 79-C-200 (N.D. Ill., filed Jan. 19, 1979).

In *Dart Indus. Inc. v. Conrad*, 462 F. Supp. 1 (S.D. Ind. 1978), the court entered a temporary restraining order enjoining enforcement of the old Act and the Delaware Tender Offers Act, DEL. CODE tit. 8, § 203 (1976). Subsequently, the Indiana Securities Commissioner issued an order exempting Dart's tender offer for the shares of P.R. Mallory & Company from the old Act, and the Indiana officials were dismissed from the case. The court thereafter held that the Delaware Act was preempted by the Williams Act and was invalid under the commerce clause, and the court granted permanent injunctive relief. 462 F. Supp. at 14-15. Also, a challenge to a takeover statute was declared moot when the offeror decided not to proceed in *Tyco Labs., Inc. v. Connelly*, [1979] FED. SEC. L. REP. (CCH) ¶ 96,933 (D. Mass.).

¹⁷⁰*Leroy v. Great W. United Corp.*, 47 U.S.L.W. 4844 (U.S. June 26, 1979).

¹⁷¹*Id.* at 4846-47.

¹⁷²15 U.S.C. § 78bb(a) (1976).

¹⁷³47 U.S.L.W. at 4847. See 15 U.S.C. § 78aa (1976).

¹⁷⁴47 U.S.L.W. at 4848 (White, J., dissenting).

¹⁷⁵*City Investing Co. v. Simcox*, No. 1P-79-462-C (S.D. Ind., filed July 27, 1979).

¹⁷⁶See notes 223-46 *infra* and accompanying text.

The definition section of the new Act,¹⁷⁷ like the definition section of the old Act,¹⁷⁸ is jurisdictional in nature because it determines which tender offers are covered. Several definitions in the two acts remain the same,¹⁷⁹ whereas others, though worded differently, are identical in substance and form.¹⁸⁰ The definition of "equity security," revised but still broadly defined, includes stock or similar securities possessing the right to vote on corporate matters at the time of the offer; securities convertible into such voting securities; warrants or rights to purchase such securities, as well as any other security denominated by regulations of the securities commissioner as necessary for investor protection.¹⁸¹ Thus, the new Act is not limited to corporate common shares but includes all securities that can influence control of the business enterprise.

A major change was made to the definition of "takeover offer." The new Act still defines takeover as "an offer to acquire or an acquisition of any equity security of a target company, pursuant to a tender offer or request or invitation for tenders, if, after the acquisition, the offeror is directly or indirectly a record or beneficial owner of more than ten percent . . . of any class of the outstanding equity securities of the target company."¹⁸² Certain transactions are excluded from the definition of a takeover, however, such as ordinary brokerage transactions, diminimus offers or acquisitions not exceeding two percent of the class within the preceding twelve months, or transactions determined by a ruling of the securities commissioner to be takeover offers not having or intended to have the effect of changing or influencing the control of the target corporation.¹⁸³

¹⁷⁷IND. CODE § 23-2-3.1-1 (Supp. 1979).

¹⁷⁸*Id.* § 23-2-3-1 (1976) (repealed 1979).

¹⁷⁹*Compare id.* § 23-2-3-1(f) (1976) (repealed 1979), *with id.* § 23-2-3.1-1(f) (Supp. 1979) (offeror). *Compare id.* § 23-2-3-1(g) (1976) (repealed 1979), *with id.* § 23-2-3.1-1(g) (Supp. 1979) (offeree). *Compare id.* § 23-2-3-1(h) (1976) (repealed 1979), *with id.* § 23-2-3.1-1(h) (Supp. 1979) (person).

¹⁸⁰*Compare id.* § 23-2-3-1(d) (1976) (repealed 1979), *with id.* § 23-2-3.1-1(d) (Supp. 1979) (control).

¹⁸¹*Compare id.* § 23-2-3-1(e) (1976) (repealed 1979), *with id.* § 23-2-3.1-1(e) (Supp. 1979).

¹⁸²*Id.* § 23-2-3.1-1(i) (Supp. 1979). Neither the 1934 Act nor the Williams Act amendments define the term tender or takeover offer, but the meaning of the term has become established to some extent under federal law. *See generally* Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250 (1973). In February 1979, the SEC reaffirmed its position that because of the dynamic nature of tender offers, "a definition of the term 'tender offer' is neither appropriate or [sic] necessary." [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,935. The SEC, however, recently asked its staff to draft a rule to settle the issue of what constitutes a tender offer. *See* The Wall Street Journal, July 18, 1979, at 5, col. 1.

¹⁸³IND. CODE § 23-2-3.1-1(i)(1)-(2), (4) (Supp. 1979).

The new Act, as in the old Act, also excludes offers by the target company to purchase its own equity securities.¹⁸⁴ This exemption can be criticized because of the relatively recent phenomenon of publicly held corporations "going private" a few years after going public by buying the shares in the hands of a presumably unhappy public.¹⁸⁵ These shareholders are entitled to protection, and the takeover statute should be extended to include them. The exclusion does permit a tender for securities to increase a supply of treasury shares for corporate purposes, but if this were the sole purpose of the exclusion, it should have been drawn more narrowly. Also, in purchasing its own shares the corporation might be required to have an "agent," as defined under the Indiana Securities Act,¹⁸⁶ carry out the acquisition, with such a transaction subject to the antifraud¹⁸⁷ and criminal and civil penalty provisions of that act.¹⁸⁸ For this type of transaction, however, no information has to be disclosed—a critical omission if the new Act is designed to protect the investor and not corporate management, which usually benefits from a "going private" transaction.

Under the old Act, any company with less than fifty owners of record at the time of a takeover offer was excluded from the definition of a takeover.¹⁸⁹ Under the new Act, the same result is achieved by excluding "an issuer which does not have a class of equity securities held of record by fifty . . . or more persons as of the time of the offer"¹⁹⁰ from the definition of a target company.

One major difference in the new Act is that tender offers initiated or approved by the board of directors of the target company are no longer excluded as they were under the old Act.¹⁹¹ Thus, the so called "friendly" tender offer is now subject to regulation. This is a decided improvement, limiting management from "selling out" the shareholders.¹⁹²

¹⁸⁴Compare *id.* § 23-2-3-1(i)(4) (1976) (repealed 1979), with *id.* § 23-2-3.1-1(i)(3) (Supp. 1979).

¹⁸⁵See generally 1975 Survey, *supra* note 164, at 55 n.101. The SEC recently adopted rules relating to "going private" transactions which prohibit fraudulent acts. [1979 Transfer Binder] FED. SEC. L. REP. ¶¶ 82,166-67.

¹⁸⁶IND. CODE § 23-2-1-1(b) (Supp. 1979).

¹⁸⁷*Id.* § 23-2-1-12 (1976).

¹⁸⁸*Id.* §§ 23-2-1-18.1 to -19 (1976 & Supp. 1979). A shareholder derivative suit might afford some protection if there is abuse. See *Perlman v. Feldman*, 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955). Procedural hurdles, however, decrease the effectiveness of such a remedy. See generally H. HENN, *supra* note 19, §§ 358-359; 2 G. HORNSTEIN, *supra* note 19, § 734.

¹⁸⁹IND. CODE § 23-2-3-1(i)(2) (1976) (repealed 1979).

¹⁹⁰*Id.* § 23-2-3.1-1(j)(5) (Supp. 1979).

¹⁹¹See *id.* § 23-2-3-1(i)(5) (1976) (repealed 1979).

¹⁹²One section of the new Act may cause a problem in this respect because it authorizes the securities commissioner to exempt "a takeover offer that is not made

Perhaps the most significant change in the definition section of the new Act is in the definition of "target company." The old Act defined a target company as "a corporation or other issuer of securities which is either organized under the laws of this state *or* has its principal place of business *or* a substantial portion of its total assets in this state."¹⁹³ The new Act, however, defines "target company" as "an issuer of securities which is organized under the laws of this state, has its principal place of business in this state, *and* has substantial assets in this state."¹⁹⁴ In other words, the old Act applied if any one of the three elements—incorporation, principal place of business, or substantial portion of assets—was satisfied, but the legislature drastically narrowed the scope of the new Act by requiring all three elements to coalesce. Whether this narrowing will protect the new Act from constitutional challenge remains to be seen.¹⁹⁵

The definition of target company under the old Act was so broad and had such extraterritorial scope that, theoretically, Indiana could have applied the term to a Saudi Arabian making a tender offer for English-owned shares of General Motors Corporation because of the extent of General Motors' Indiana assets. Of course, the old Act used the phrase "substantial assets," and the securities commissioner could have determined that the assets of General Motors in Indiana, though substantial in absolute terms, were not substantial relative to the worldwide assets of General Motors; thus, such a tender offer would have been exempt.¹⁹⁶

Also, a target company was defined under the old Act as "a corporation or other issuer of securities,"¹⁹⁷ whereas under the new Act it is defined as "an issuer of securities."¹⁹⁸ Although the language has been changed, it still appears that noncorporate business enterprises are subject to the new Act.

Finally, the old Act excluded target companies such as insurance companies, financial institutions, or public utilities for which a takeover offer was subject to approval by a state or federal

for the purpose of, and not having the effect of, changing or influencing the control of a target company." *Id.* § 23-2-3.1-1(2)(4) (Supp. 1979). The commissioner thus has considerable discretion to exempt friendly tender offers, and if a target's board of directors approved an offer, the commissioner might be favorably disposed to exempt the offer as not "changing or influencing the control" of the target company.

¹⁹³*Id.* § 23-2-3-1(j) (1976) (repealed 1979) (emphasis added).

¹⁹⁴*Id.* § 23-2-3.1-1(j) (Supp. 1979) (emphasis added).

¹⁹⁵See notes 223-46 *infra* and accompanying text.

¹⁹⁶Apparently, this was done in several tender offer filings under the old Act. See *Dart Indus. Inc. v. Conrad*, 462 F. Supp. at 7 (S.D. Ind. 1978).

¹⁹⁷IND. CODE § 23-2-3-1(j) (1976) (repealed 1979).

¹⁹⁸*Id.* § 23-2-3.1-1(j) (Supp. 1979).

regulatory agency.¹⁹⁹ This feature has been carried over to the new Act.²⁰⁰

The key substantive provisions of the old Act have not been changed. A takeover, as defined under either Act, is permitted only if the offer has become effective or is exempted by regulation or order of the securities commissioner.²⁰¹ The new Act provides that prior to a tender offer, the offeror must file a disclosure statement with the Indiana securities commissioner and deliver a copy of the statement to the president of the target company at its principal office by the same date.²⁰²

Perhaps the most significant difference between the new Act and the old Act is in the nature of the disclosure statement. The disclosure statement under the old Act was similar to the Indiana Securities Act registration statement,²⁰³ including offerors subject to the filing requirements of the Williams Act.²⁰⁴ Under the new Act, in a clear effort to avoid the Williams Act preemption ground found offensive in *Great Western*, the detailed disclosure statement must be filed only when the takeover is not subject to any requirement of federal law.²⁰⁵ If a tender offer is subject to the Williams Act or any other federal law, one copy of each document filed with the SEC or any other federal agency will satisfy the requirement.²⁰⁶ The requirement that the material terms of the proposed offer be publicly disclosed when the disclosure statement is filed has been eliminated.²⁰⁷

The new Act provides that "[a] takeover offer may be made . . . fifteen . . . business days after the date of filing the statement or such shorter time as the commissioner orders."²⁰⁸ Shares may not be purchased or paid for within the first fifteen business days after the

¹⁹⁹*Id.* § 23-2-3-12 (1976) (repealed 1979). See generally Galanti, *Business Associations, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 57, 86 (1976).

²⁰⁰IND. CODE §§ 23-2-3.1-1(j)(1)-(4) (Supp. 1979).

²⁰¹*Compare id.* § 23-2-3-2(a) (1976) (repealed 1979), with *id.* § 23-2-3.1-2 (Supp. 1979). The offeror still must file a consent to service of process and pay a filing fee of \$750. *Compare id.* § 23-2-3-2(c), -7 (1976) (repealed 1979), with *id.* § 23-2-3.1-4 (Supp. 1979). An Indiana attorney need no longer file the statement. See *id.* § 23-2-3-2(b) (1976) (repealed 1979).

²⁰²*Id.* § 23-2-3.1-3 (Supp. 1979).

²⁰³*Compare id.* § 23-2-1-5 (1976) (Securities Act), with *id.* §§ 23-2-3-2(b)-(c) (1976) (repealed 1979) (old Act).

²⁰⁴15 U.S.C. §§ 78m(b)-(c), 78n(d)-(f) (1976).

²⁰⁵IND. CODE § 23-2-3.1-5 (Supp. 1979).

²⁰⁶*Id.*

²⁰⁷*Id.* § 23-2-3-2(b) (1976) (repealed 1979). This requirement prevented persons with advance knowledge of the takeover from taking advantage of it on the securities market.

²⁰⁸*Id.* § 23-2-3.1-6 (Supp. 1979).

offer, or in violation of any order of the securities commissioner.²⁰⁹ Thus, there is a minimum of thirty days between the time when the corporate management of the target company becomes aware of a potential tender offer and the time when the shares can be purchased. This obviously favors the target management because it eliminates the quick tender offer known as the "Saturday night special," and gives the target management an opportunity to defend a takeover.²¹⁰

The new Act still has a pro-management title, but it is an improvement over the old Act. The old Act provided that a takeover could not become effective until twenty days after the filing of the disclosure statement or any amendment thereto, except by order of the commissioner.²¹¹ It further provided that the effectiveness of an offer could be delayed if the commissioner ordered, or the target company requested, a hearing to determine whether the proposed tender offer was fair and equitable to the security holders.²¹² By carefully planned stalling tactics, the target corporation's management could delay an offer for up to 100 days, not including the additional time available to appeal an unfavorable order by the commissioner.²¹³ This potential for delay could have given management an opportunity to better the terms of the offer, benefiting the shareholders, but it also could have been used to thwart an offer which may have benefited the shareholders.

Under the new Act, the securities commissioner must hold a hearing within fifteen days of the statement's filing date.²¹⁴ After the hearing but within those fifteen days, if "the commissioner finds that the takeover offer is unfair or inequitable to the holders of the securities of the target company, or the takeover offer is not made to all offerees on substantially equal terms, he shall by order prohibit the purchase of shares tendered in response to the takeover offer or condition purchase upon changes or modifications."²¹⁵

The requirement under the old Act for the target company, as well as the offeror, to file copies of materials sent to shareholders with the securities commissioner has been eliminated.²¹⁶ Similarly, the antifraud provision of the old Act,²¹⁷ which applied to both target

²⁰⁹*Id.* § 23-2-3.1-8.

²¹⁰The advance notice requirement still presents a problem even though the SEC recently lengthened to 30 days the time a tender offer must remain open. [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,935.

²¹¹IND. CODE § 23-2-3-2(e) (1976) (repealed 1979).

²¹²*Id.* § 23-2-3-2(e)-(f).

²¹³*See generally* 1975 *Survey*, *supra* note 164, at 59.

²¹⁴IND. CODE § 23-2-3.1-7 (Supp. 1979).

²¹⁵*Id.* "Not less than five (5) business days' notice of a hearing must be given to the target company and the offeror." *Id.* § 23-2-3.1-9(c).

²¹⁶*Id.* § 23-2-3-3 (1976) (repealed 1979).

²¹⁷*Id.* § 23-2-3-4.

companies and offerors, does not appear in the new Act. The provision in the old Act which dealt with the securities of the target company that had been tendered was also deleted.²¹⁸

The new Act gives the securities commissioner injunctive powers and the right to obtain judicial relief against violations of the Act similar to the powers granted under the old Act and the Indiana Securities Act.²¹⁹ The new Act, as did the old Act, authorizes the target company, the offeror, or any offeree to bring suit to enjoin violations or to enforce compliance.²²⁰

Notwithstanding the order upholding the new Act entered in *City Investing Co. v. Simcox*,²²¹ the new Act's ultimate fate depends on whether the rationale of the Texas district court and the Fifth Circuit in striking down the Idaho Business Takeover Act in *Great Western* would prevail if the proper case were to reach the Supreme Court.²²² A brief review of the case is necessary for an appreciation of the prospects of the new Act.²²³

A two-fold rationale was behind the Fifth Circuit's decision in *Great Western*. The first ground for striking down the Idaho statute was that it conflicted with and frustrated the clear purpose of the Williams Act amendments to the 1934 Act requiring disclosures by companies making tender offers.²²⁴ As the court noted, the Williams Act was intended to protect shareholders of target companies by requiring disclosure while not unduly impeding cash takeover bids.²²⁵ The Idaho statute destroyed the "careful balance" between the interests of the offeror and those of the management of the target company by tilting the contest in favor of the management. Because it favored management, the statute could have been detrimental to shareholders by discouraging tender offers or by reducing the offer price.²²⁶

²¹⁸*Id.* § 23-2-3-5. See generally 1975 Survey, *supra* note 164, at 58.

²¹⁹Compare IND. CODE § 23-2-1-17.1 (1976) (Securities Act), with *id.* § 23-2-3-8 (1976) (repealed 1979), and *id.* § 23-2-3.1-9(a), -10(a), (c) (Supp. 1979).

²²⁰Compare *id.* § 23-2-3-8(b) (1976) (repealed 1979), with *id.* § 23-2-3.1-10(b), (c) (Supp. 1979). The new Act's provision for judicial review of any final order of the securities commissioner is a similar but more limited version of the old Act's comparable provision. Compare *id.* § 23-2-3-11 (1976) (repealed 1979), with *id.* § 23-2-3.1-11 (Supp. 1979).

²²¹No. IP-79-462-C (S.D. Ind., filed July 27, 1979).

²²²The decisions cited in note 126 *supra* relied on *Great Western* in striking down takeover acts.

²²³The discussion will focus on the Fifth Circuit's opinion, but the rationale of that court and the trial court were basically the same. The *Great Western* decision was first examined and discussed by this author in Galanti, *Business Associations, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 27, 46 (1978) [hereinafter cited as 1977 Survey].

²²⁴15 U.S.C. §§ 78m(b)-(c), 78n(d)-(f) (1976).

²²⁵577 F.2d at 1277.

²²⁶*Great Western* in fact reduced its initial bid by one dollar because of manage-

The court recognized that federal law did not and could not totally occupy the field of securities regulation,²²⁷ but the court concluded that the Idaho statute was so contrary to the Williams Act in intent and purpose that it was preempted by the latter under the supremacy clause of the Constitution.²²⁸ The statute was also struck down under the commerce clause of the Constitution²²⁹ because it had a substantial effect on interstate commerce and did not accomplish a legitimate local purpose.²³⁰

There are no hard and fast rules which determine when a particular state statute will be deemed preempted by federal legislation. The Supreme Court generally decides preemption cases on a case-by-case basis.²³¹ The court will hold that a state statute or regulation has been preempted by federal legislation or regulations when it finds that Congress intended the federal law to be paramount.²³² It should be noted, however, that recent Supreme Court

ment's opposition to the tender offer. See *Business Week*, Oct. 3, 1977, at 40. The bid was eventually raised, however, when Great Western reached an accord with the target company. See *The Wall Street Journal*, Oct. 6, 1977, at 16, col. 3.

²²⁷Section 18 of the Securities Act of 1933, 15 U.S.C. § 77r (1976), and § 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a) (1976), specifically allow state regulation of securities. See *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 461 (1969). However, § 28(a) permits state regulation only to the extent that it does not conflict with the federal regulatory scheme.

²²⁸577 F.2d at 1275. See U.S. CONST. art. VI, cl. 2.

²²⁹U.S. CONST. art. I, § 8, cl. 3.

²³⁰577 F.2d at 1286. Most commentators have agreed with the Fifth Circuit's decision in *Great Western*. See generally Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213 (1977); Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1 (1976); Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133 (1974). But see Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510 (1979).

²³¹See *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), in which the Court stated: "Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question." *Id.* at 638.

²³²The intent may be found from the express language of the statutes, see *Goldstein v. California*, 412 U.S. 546 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); by inference from legislative history, see *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); from the comprehensive nature of the congressional legislative scheme, see *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); from the need to promote a uniform national policy in a particular area, see *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *San Diego Trades Council v. Garmon*, 359 U.S. 236 (1959); or when the state statute or regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52 (1941).

It should be recognized that the Williams Act is not a pervasive regulatory scheme, and it is conceivable that the Supreme Court could allow the state statutes to stand as a second-line protection for investors. This would recognize the long-accepted

decisions have reflected a hostility toward presuming or inferring congressional intent to preempt a field, and this attitude would certainly help a state defending a takeover statute from a preemption challenge.²³³

The Fifth Circuit in *Great Western* did not, as it could not, find an express intent on the part of Congress to preempt the regulation of tender offers and takeovers when it adopted the Williams Act amendments. The Fifth Circuit relied on the test of *Hines v. Davidowitz*,²³⁴ which preempts state statutes or regulations when they stand as obstacles to the accomplishment and execution of the purposes and objectives of federal legislation. The court invalidated the Idaho statute because its "fiduciary" approach, which examines the fairness of the offer to the shareholders, collided with the "market" approach of the Williams Act, which envisions a scheme leaving the outcome of a takeover attempt to the marketplace by providing adequate information to the offerees.²³⁵

Because many of the blatantly pro-management features, such as the right of the target company to request a hearing by the securities commissioner and the exemption of the friendly tender offer, have been eliminated from Indiana's statute, the new Act is a decided improvement over the old Act. However, the new Act still has a "fiduciary" cast to it that might conflict with the balanced "market" approach of the Williams Act and thus prove fatal under the reasoning of *Great Western*.

For example, the advance filing requirement gives the management of the target company valuable additional time, not available under the Williams Act, during which it can work to defeat the offer.²³⁶ Furthermore, the right of the securities commissioner to block a tender offer which he finds to be "unfair or inequitable to the holders of the securities of the target company," or which "is not made to all offerees on substantially equal terms" gives him the power to stop a takeover attempt that has satisfied all the disclosure requirements of the Williams Act.²³⁷

As already noted, one major difference between the two takeover acts is that under the new Act the extensive disclosure requirements apply only to takeover offers which are not subject to

state role in the securities area. See Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 137 (1973). See generally Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510, 519-20 (1979).

²³³See, e.g., Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 132 (1978); DeCanas v. Bica, 424 U.S. 351 (1976); New York State Dep't of Social Serv. v. Dublino, 413 U.S. 405 (1973).

²³⁴312 U.S. 52 (1941).

²³⁵577 F.2d at 1276-81.

²³⁶IND. CODE § 23-2-3.1-3 (Supp. 1979).

²³⁷*Id.* § 23-2-3.1-7.

any requirement of federal law.²³⁸ The ultimate success of this stratagem remains to be seen. Certainly, the burden imposed on offerors subject to the Williams Act has been lessened, but this is irrelevant if the entire scheme of the new Act, which gives management advance notice of the offer and which gives the securities commissioner authority to, in effect, regulate the substantive terms of the tender offer, is still an "obstacle" in the way of the federal scheme established by the Williams Act. It appears that the new Act's scheme is such an obstacle. In fact, it is possible if not probable that the only way to insure that a takeover statute would survive a preemption challenge would be to exclude tender offers for target companies that are subject to the Williams Act.²³⁹

Even if the new Act can withstand a challenge on preemption grounds, it might fall under the commerce clause rationale of *Great Western*. The new Act's jurisdictional scope has been narrowed by making it applicable only to target companies that are organized under the laws of Indiana, have their principal places of business in this state, and have substantial assets in this state.²⁴⁰ The impact on interstate commerce is much less than under the old Act, but it might still be too much. Cash tender offers for such targets will continue to involve interstate commerce because the mail, telephones, and other instrumentalities of interstate commerce will be used. The new Act does not require the offerees to be citizens or residents of Indiana, even though the target company must have close Indiana ties. Thus, the new Act still has extraterritorial effects because it applies to offers to persons who have no connection with Indiana other than owning shares of an Indiana corporation.

Consequently, the requisite local public interest and benefit that sustain state statutes affecting interstate commerce might be absent.²⁴¹ Protecting Indiana investors is a legitimate state interest, but this interest might not be sufficiently pervasive to save a statute which applies to investors in other states as well. A state's interest in the benevolent management of a corporation, which can influence the corporation's commitment to a community and the nature of life in the community, was also recognized by the Fifth Circuit in *Great Western*.²⁴² This interest is laudable and legitimate, but the burdens imposed on interstate commerce might be disproportionate to the legitimate benefits. Of course, an intent to

²³⁸ See notes 203-07 *supra* and accompanying text.

²³⁹ In other words, it might be necessary to exclude tender offers for companies that are registered under § 12 of the 1934 Act. 15 U.S.C. § 78l (1976).

²⁴⁰ See notes 193-95 *supra* and accompanying text.

²⁴¹ See, e.g., *Pike v. Bruce Church*, 397 U.S. 137 (1970); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

²⁴² 577 F.2d at 1286.

protect incumbent management or prevent the removal of local businesses from Indiana is clearly not legitimate when a burden is imposed on interstate commerce.²⁴³

The purpose of the new Act ostensibly is to provide Indiana shareholders with adequate information about a tender offer and to give them adequate time to respond intelligently. This again is laudable, but the Act may have gone too far. It has been recognized that "[s]tate tender offer regulations can permissibly promote this legitimate local interest [protection of resident shareholders] only if they are limited to the protection of state residents and the regulation of essentially intrastate transactions."²⁴⁴ In other words, to withstand a commerce clause challenge, the takeover statute might have to adopt the traditional Blue Sky approach, which would limit application strictly to Indiana transactions.²⁴⁵

Although the answer is far from certain, it is distinctly possible that the new Act is constitutionally flawed. The Act maintains a "fiduciary approach" as contrasted with the "market approach" of the Williams Act, and could be preempted as an obstacle to the accomplishment of the purposes of the federal statute. Although the jurisdictional scope of the new Act has been narrowed, which improves its prospects under a commerce clause attack, the new Act can operate to deprive shareholders in other states of an opportunity to accept a cash tender offer. This could place an intolerable burden on interstate commerce even when balanced with the benefits. The new Act thus appears designed to protect the "ins" and "locals" from "outsiders" and "[l]ike most legislation which is xenophobic and parochial, [the new Act like other] state bulwarks against 'raiding' . . . [is] often offensive to common sense."²⁴⁶

²⁴³See *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970); 577 F.2d 1256.

²⁴⁴Note, *Securities Laws and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510, 529 (1979).

²⁴⁵*Id.* See also E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 157 (1973); E. ARANOW & H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 231 (1977). However, even if the Act were so amended, it would still be necessary to determine whether it protected investors or furthered other legitimate state interests without unduly burdening interstate commerce. It is not clear that commerce would not be burdened. An offeror might still have to comply with other tender offer statutes, and although the right of management to demand a hearing has been eliminated, the mandatory hearing requirement can be burdensome to an offeror faced with similar hearing requirements under other statutes. Furthermore, there is still the advance notification requirement which appears to benefit incumbent management rather than the shareholders. Protection of management rather than shareholders is not a legitimate state interest; thus, it would seem that the requirement would be an impermissible burden on interstate commerce.

²⁴⁶See generally Gould & Jacobs, *The Practical Effects of State Tender Offer Legislation*, 23 N.Y.L. SCH. L. REV. 399, 402 (1977).

2. *Amendments to the General Corporation and Not-for-Profit Corporation Acts.*—Another significant legislative development was the enactment of Public Law 233,²⁴⁷ which amends various sections of the Indiana General Corporation Act²⁴⁸ and the Indiana Not-for-Profit Corporation Act.²⁴⁹ Although some of the legislative changes are sensible and noncontroversial, others are open to criticism.

One of the major statutory changes was an amendment to section 23-1-2-11(b)²⁵⁰ of the Indiana Act. That section now permits a corporation to have a one-member board of directors, regardless of the number of shareholders.²⁵¹ Previously, the section required that the board of directors of a corporation have at least three members unless there were fewer than three shareholders.²⁵² The amendment can be criticized with respect to form as well as substance.

In terms of form, the statute is deficient insofar as it indirectly, rather than directly, authorizes a one-member board of directors. Although the intent of the legislature and the effect of the new amendment are clear, the language itself could have been more precise. For instance, the legislature might have amended the initial portion of section 23-1-2-11(b) to read: "The board of directors of a corporation shall consist of one or more members. Unless otherwise provided in the articles of incorporation, the number of the directors shall be fixed by the bylaws"

The amendment is defective in substance as well as form. The statutory language permitting a corporation to have only one director when there is more than one shareholder might ease the task of the estate planner whose client wishes to distribute corporate shares to beneficiaries while maintaining complete control of the corporation as the sole director, but the amendment puts the minority shareholders of such a corporation in an unfortunate position by subjecting their interests to the "dictatorial" actions of the sole director. The director is bound by the general statutory re-

²⁴⁷Act of Apr. 9, 1979, Pub. L. No. 233, 1979 Ind. Acts 1089 (codified in scattered sections of IND. CODE tit. 237). The Act is similar to a proposed bill drafted by the office of the Indiana Secretary of State for presentation by the Indiana Corporations Survey Commission to the Indiana General Assembly during its 1978 session.

²⁴⁸IND. CODE §§ 23-1-1-1 to -12-6 (1976 & Supp. 1979) [hereinafter referred to as the Indiana Act].

²⁴⁹IND. CODE §§ 23-7-1.1-1 to -66 (1976 & Supp. 1979).

²⁵⁰*Id.* § 23-1-2-11(b) (Supp. 1979).

²⁵¹Section 23-1-2-11(b) now reads in pertinent part: "Unless otherwise provided in the articles of incorporation, the number of the directors, *whether one (1) or more*, shall be fixed by the by-laws" *Id.* (emphasis added).

²⁵²*Id.* § 23-1-2-11(b) (Supp. 1978) (amended 1979). This former version provided that when all the shares of a corporation were owned beneficially and of record by either one or two persons, the number of directors could be less than three, but not less than the number of shareholders. *Id.*

quirements of good faith and due care, and the minority shareholders can bring a derivative action against a director who abuses his fiduciary power. Nevertheless, it is preferable to prevent or at least lessen the likelihood of a directorial abuse of power than to rely on remedies once it occurs. The old saw is appropriate—an ounce of prevention is worth a pound of cure.

Prior to 1969 the Indiana Act required that a corporation have a minimum of three directors regardless of the number of shareholders. This requirement did not make a great deal of sense for corporations having only one shareholder. In such corporations, the requirement simply served to promote the formation of three-member boards consisting of a sole shareholder, a spouse, and perhaps an attorney or an in-law. Beginning in 1969, however, a corporation with one shareholder could have a one-person board and a corporation with two shareholders could have a two-person board. The requirement of a minimum of three directors applied only to corporations having three or more shareholders.²⁵³ Section 23-1-2-11(b), before it was amended, was sufficiently broad to take into account both one- or two-shareholder corporations, as well as larger corporations in which the interests of a greater number of shareholders were implicated. In the latter case, the shareholders' rights were protected by the requirement of a three-member board, which insured that corporate decisions would be made on a collegial basis.

The foregoing analysis is not blind to the reality that a majority or controlling shareholder can influence the decisions of other directors who can be removed without cause under the Indiana Act.²⁵⁴ Instead, it recognizes that other directors can make beneficial contributions to the corporate decision-making process and can even act as a brake on actions of the controlling shareholder that might be detrimental to the interests of minority shareholders. Legislative elimination of this potential check simply to expedite estate planning appears to be shortsighted.

It can be argued that the legislature has "modernized" the Indiana Act by eliminating the requirement of a minimum number of directors; the drafters of the Model Business Corporation Act eliminated a similar requirement in 1969.²⁵⁵ However, the amendment also can be labeled as further evidence that Indiana has joined

²⁵³IND. CODE ANN. § 25-208 (Burns 1970) (currently codified at IND. CODE § 23-1-2-11(b) (1976) (amended 1979)).

²⁵⁴See IND. CODE § 23-1-2-12 (1976).

²⁵⁵MODEL BUS. CORP. ACT ANN. 2d § 36 (1971). The rationale for removing the minimum requirement was that "[i]t was deemed wise to recognize in the statute the growing practice of one-man management in closed corporations." *Id.* ¶ 2, at 777.

what Justice Brandeis' dissent in *Liggett Co. v. Lee*²⁵⁶ characterized as a "race . . . of laxity."²⁵⁷ It seems that every time the Model Act is revised under the rubric of "modernization," the interests of shareholders, as opposed to those of management, are sacrificed.²⁵⁸ The same subordination of shareholders' interests seems to be true of recent amendments to the Indiana Act.²⁵⁹

Another possible problem with the one-member board is that the director might have difficulty differentiating his individual interests from the interests of the corporation. As a result, the formality of the corporate structure might be compromised. In other words, the sole director of a corporation might be subjected to personal liability if the "corporate veil" were pierced. If there were a multimember board, however, the likelihood of personal liability in the event of "piercing" would be reduced.²⁶⁰ Of course, it can be assumed that in corporations with many shareholders, or few shareholders who have personal interests to protect, multimember boards will be the rule. Nevertheless, by permitting one person to form a corporation which ultimately will have more than three shareholders but which will have only one director, the legislature has created a potential problem which does not appear to be warranted simply for the sake of convenience for estate planners.

Another significant change in the Indiana Act relates to the procedures for reinstating a corporation whose term of existence as fixed by its articles of incorporation has expired. In 1977, the legislature adopted section 23-3-4-1.6,²⁶¹ which governs the reinstatement of those corporations whose terms of existence have expired and whose articles of incorporation have been forfeited for failure to file annual reports. The 1977 version required such corporations to

²⁵⁶288 U.S. 517 (1933).

²⁵⁷*Id.* at 559 (Brandeis, J., dissenting).

²⁵⁸See generally Eisenberg, *The Model Business Corporation Act and the Model Business Corporation Act Annotated*, 29 BUS. LAW. 1407 (1974).

²⁵⁹For example, § 23-1-2-11 of the Indiana Act, amended in 1979, was also amended in 1977. Act of Apr. 22, 1977, Pub. L. No. 76, § 3, 1977 Ind. Acts 380 (current version at IND. CODE § 23-1-2-11 (Supp. 1979)). At that time, the legislature adopted the affirmative duty of care of a director described in § 35 of the Model Act. MODEL BUS. CORP. ACT ANN. 2d § 35 (Supp. 1977). That amendment, criticized in the 1977 *Survey*, *supra* note 223, at 47-50, in effect reduced the duty of care of outside directors who might be the only persons able to police management.

²⁶⁰Although the likelihood of personal liability is relatively low in the case of a three-member board, it is fairly high in the case of a one-person corporation. Nonetheless, since 1969 the Indiana Act has permitted such a corporation to have only one director.

²⁶¹Act of Apr. 22, 1977, Pub. L. No. 76, § 10, 1977 Ind. Acts 397 (codified at IND. CODE § 23-3-4-1.6 (Supp. 1977) (amended 1979)). See 1977 *Survey*, *supra* note 223, at 50-51.

make application to the secretary of state for reinstatement.²⁶² Upon approval of the application, the corporation was "deemed to have continuously existed since the date of termination of its existence as fixed by its articles of incorporation."²⁶³

Also in 1977 the legislature amended section 23-1-7-4,²⁶⁴ dealing with dissolution by expiration of term of existence, to correspond with section 23-3-4-1.6.²⁶⁵ Under the prior version of section 23-1-7-4, a corporation whose term of existence had expired could extend its duration by amending its articles of incorporation.²⁶⁶ Under the 1977 amendment, however, a corporation seeking to extend its term of existence under section 23-3-4-1.6 had to apply to the secretary of state for reinstatement.²⁶⁷

One problem with the 1977 versions of sections 23-3-4-1.6 and 23-1-7-4 was that the duration of reinstatement of a corporation whose term of existence had expired was not clear. This problem has been remedied in part by the new amendment to section 23-1-7-4, which provides that when a corporation whose term of existence has expired seeks to be reinstated it not only must make application to the secretary of state for reinstatement but also it must "amend its articles of incorporation to provide for an increase in its term of existence."²⁶⁸

Section 23-3-4-1.6 was similarly amended. A corporation whose term of existence has expired must include in its application for reinstatement "[a]mendments to its articles of incorporation increasing its term of existence."²⁶⁹

Nevertheless, the approach taken by the legislature raises a new problem. It is arguable that the original version of section 23-3-4-1.6 automatically gave perpetual duration to a reinstated corporation. An expired corporation applying for reinstatement is likely to seek perpetual reinstatement, even when the original selection of limited duration was deliberate.²⁷⁰ Of course, if those responsible for seeking reinstatement of the corporation wished to limit its duration, the articles of incorporation could be amended by the regular amendment procedure of the Indiana Act.²⁷¹

²⁶²IND. CODE § 23-3-4-1.6(a) (Supp. 1977) (amended 1979).

²⁶³*Id.* § 23-3-4-1.6(c).

²⁶⁴Act of Apr. 22, 1977, Pub. L. No. 76, § 4, 1977 Ind. Acts 385 (codified at IND. CODE § 23-1-7-4 (Supp. 1977) (amended 1979)).

²⁶⁵IND. CODE § 23-3-4-1.6 (Supp. 1977) (amended 1979).

²⁶⁶*Id.* § 23-1-7-4 (1976) (amended 1977 & 1979).

²⁶⁷*Id.* (Supp. 1977) (amended 1979).

²⁶⁸*Id.* (Supp. 1979).

²⁶⁹*Id.* § 23-3-4-1.6(a)(3) (Supp. 1979).

²⁷⁰*See 1977 Survey, supra* note 223, at 51. Admittedly, one problem with this approach would be that a corporation reinstated with automatic perpetual duration under section 23-3-4-1.6 would still have a set of articles containing a limited term.

²⁷¹IND. CODE §§ 23-1-4-1 to -7 (1976).

The 1979 amendment to section 23-3-4-1.6 resolves an additional problem under the original version. As initially adopted, section 23-3-4-1.6(b) provided:

If the officer or director who files the affidavit [for reinstatement] was not . . . named in the last preceding timely-filed annual report, the affidavit shall also be signed by a person who was an officer or director at such time, or . . . be accompanied by evidence that notice of intent . . . to seek reinstatement has been sent to the last known address of the resident agent and every officer named on the last timely-filed annual report at least thirty . . . days prior to the filing of the affidavit.²⁷²

The 1979 version adds a sentence to the above-quoted language to provide for the situation in which no annual report has been filed. In such a case, “notice of intent . . . to seek reinstatement . . . [must be] sent to all incorporators and directors named in the articles of incorporation of the corporation.”²⁷³

A third worthwhile change secured by Public Law 233 was the elimination of the requirement that annual reports of both domestic and foreign corporations be signed by two principal officers and acknowledged and sworn to before a notary public.²⁷⁴ Now, annual reports need be signed only by any current officer of the corporation and verified and affirmed under penalties of perjury.²⁷⁵ Simplification of the reporting requirements of corporations is a development worth encouraging. With simplified procedures, more small corporations may “get into the habit” of filing the annual reports required by law. Furthermore, any simplification will tend to reduce the number of articles of incorporation—certificates of admission in the case of foreign corporations—which are revoked because of carelessness and inattention to the requirements of the Indiana Act.

No changes similar to the ones made in the Indiana Act provisions on annual reports were made in the annual report provision of the Indiana Not-for-Profit Corporation Act.²⁷⁶ However, none were necessary because that section does not require the signature of the two principal officers,²⁷⁷ and the annual report form which the secretary of state has prepared can apparently be signed by any current officer subject to the penalties of perjury. The amendments

²⁷²*Id.* § 23-3-4-1.6(b) (Supp. 1977) (amended 1979).

²⁷³*Id.* § 23-3-4-1.6(b) (Supp. 1979).

²⁷⁴*Id.* §§ 23-1-8-1, -11-7 (1976); *id.* § 23-3-4-1.

²⁷⁵*Id.* §§ 23-1-8-1, -3-4-1 (Supp. 1979).

²⁷⁶*Id.* § 23-7-1.1-36 (1976).

²⁷⁷*Id.*

to the annual report provisions do not change the requirement that annual reports of corporations must be made on forms prescribed and furnished by the office of the secretary of state.²⁷⁸

Public Law 233, by an amendment to section 23-3-4-1, also clarified and ratified the authority of the secretary of state to revoke the articles of incorporation of domestic corporations and the certificates of admission of foreign corporations which fail to file annual reports for a period of two years.²⁷⁹ Before section 23-3-4-1 was amended, it was not absolutely clear that the secretary of state had the authority to revoke certificates of admission of foreign corporations. Arguably, he did not, although no one apparently challenged the practice. The amendment to section 23-3-4-1 also clarified the notification requirements and procedures which must be followed before articles of incorporation or a certificate of admission may be revoked. The secretary of state must give at least thirty-days notice by first-class mail to a corporation which has not filed annual reports for two years that its articles or certificate may be revoked. If the corporation fails to make the necessary filings within the thirty-day period, notice must be "published in a newspaper of general circulation in the county in which [the] corporation's principal office is located."²⁸⁰ If the corporation has not yet made the required filings within thirty days after such publication, the secretary of state is charged with revoking the rights and privileges and declaring that the articles of incorporation or certificate of admission of the corporation are forfeited.²⁸¹

The 1979 amendment to section 23-7-1.1-2 of the Indiana Not-for-Profit Corporation Act substitutes the term "acceptance" for "reorganization" to denote the process whereby not-for-profit corporations formed before the effective date of the Act may elect to accept its provisions.²⁸² There was no reason for that change. "Acceptance" rather than "reorganization" should have been the term used in the Act as originally passed because "reorganization" was not used in any other portion of the Act. Now, however, section 23-7-1.1-9 of the Act also employs the term "reorganization."²⁸³ Public

²⁷⁸[1950] OP. IND. ATT'Y GEN. 22, 24.

²⁷⁹IND. CODE § 23-3-4-1 (1976 & Supp. 1979). The amendment to this section specifically refers to not-for-profit as well as for-profit corporations. The secretary of state should have authority to revoke the articles of delinquent not-for-profit corporations, but it might have been better to have explicitly stated that authority in § 23-7-1.1-36 of the Indiana Not-for-Profit Corporation Act rather than in the annual report statute, which is, or at least arguably is, directed only at for-profit corporations.

²⁸⁰*Id.* § 23-3-4-1 (1976 & Supp. 1979).

²⁸¹*Id.* The secretary of state must endorse the articles of incorporation or the certificate of admission to indicate forfeiture for failure to file annual reports. *Id.*

²⁸²*Id.* §§ 23-7-1.1-2(a), -2(c).

²⁸³*Id.* § 23-7-1.1-9.

Law 233 changes the quorum²⁸⁴ and voting²⁸⁵ requirements with respect to meetings called for the purpose of accomplishing fundamental changes in not-for-profit corporations. These fundamental changes include *reorganizations*. The discrepancy in terminology should not cause any problems because “reorganization” as employed in section 23-7-1.1-9 encompasses “articles of acceptance.” Nevertheless, the Bill should have been examined for internal consistency before it was adopted. Housekeeping amendments remedying the inconsistency are in order.²⁸⁶

The substantive changes in the voting provision²⁸⁷ can be criticized because they create the potential for a small group of insiders to gain virtual control of a not-for-profit corporation. The changes do, however, solve the problem created by large or lethargic memberships which cannot be motivated to attend meetings during which important corporate changes are to be considered. The methods provided for alleviating the problem are the right to establish voting rights²⁸⁸ and to define a quorum²⁸⁹ when the corporation is formed. Previously, however, if the articles of incorporation did not anticipate the problem, for example when they provided that the bylaws were to be adopted by the members and not by the board of directors, a majority of the members would have had to approve an amendment vesting that authority in the board of directors.²⁹⁰ In other words, if a “mistake” were made when the corporation was first formed, it might be difficult, if not impossible, to remedy without the changes to section 23-7-1.1-9. There is the risk

²⁸⁴*Id.* § 23-7-1.1-9(f) (Supp. 1979) provides:

in cases of a meeting called for the purpose of voting on a proposed amendment to the articles of incorporation, merger, consolidation, reorganization, special corporate transaction, or voluntary dissolution, . . . a quorum shall be constituted by those members that are otherwise entitled to vote in respect thereof and that are present, in person or by proxy, at the meeting at which such vote is conducted.

²⁸⁵*Id.* § 23-7-1.1-9(e) provides that members entitled to vote on fundamental changes include “only those members that are otherwise entitled to vote with regard to such matter and who are present, in person or by proxy, at the meeting at which such vote is conducted, and whose presence at such meeting constitutes a quorum as defined in subsection (f).” See note 217 *supra*.

²⁸⁶A possible solution to the conflict between the language added to IND. CODE §§ 23-7-1.1-9(c), -9(f) (Supp. 1979), and that of the definition section, *id.* § 23-7-1.1-2 (1976 & Supp. 1979), would be to amend the former sections to substitute the term “acceptance” for “reorganization,” because the act in fact contemplates the use of articles of acceptance when a corporation formed under some other not-for-profit corporation statute becomes subject to the Indiana Not-for-Profit Corporation Act.

²⁸⁷See note 285 *supra*.

²⁸⁸IND. CODE § 23-7-1.1-9(e) (Supp. 1979).

²⁸⁹*Id.* § 23-7-1.1-9(f).

²⁹⁰*Id.* § 23-7-1.1-9(e) (1976) (amended 1979).

that insiders may lock themselves into a control position, but the benefits of relaxing the voting and quorum requirements would seem to offset the risk. Even if the insiders get out of hand, there is nothing to stop all members from attending a meeting to remedy the situation.

Section 23-7-1.1-9 as amended does present a real problem because it seems to conflict at least with section 23-7-1.1-23,²⁹¹ which defines members entitled to vote on proposed amendments to the articles of incorporation. In some situations, members who are not present at a meeting would seem to have a statutory right to vote on proposed amendments. A cleaner approach to solving the problem of the lethargic membership would have been to amend the provisions relating to the voting requirements for particular changes rather than to amend section 23-7-1.1-9(e), which is the general franchise provision of the Indiana Act.

Section 23-7-1.1-10 of the Indiana Not-for-Profit Corporation Act²⁹² was amended to eliminate the requirement that directors of such corporations be members. The change makes the provision consistent with the analogous provision of the Indiana General Corporation Act.²⁹³ This area may not be one in which consistency is appropriate. Many times an outsider who does not own shares of a for-profit corporation is a worthwhile addition to the board of directors. This is not necessarily true of a not-for-profit corporation, and perhaps such an organization should be run by its members. This would be true, for example, of a neighborhood civic league.²⁹⁴ On the other hand, it might be appropriate to permit nonmember directors of, for example, a trade association with corporate but not individual members.

The final change accomplished by Public Law 233 is an amendment to section 23-7-1.1-12²⁹⁵ permitting the articles of incorporation or bylaws of a not-for-profit corporation to "provide that officers are to be elected by the members of the corporation instead of by the board of directors."²⁹⁶ This method of electing officers was available

²⁹¹*Id.* § 23-7-1.1-23 (1976). Section 23-7-1.1-9 does not seem to conflict with the provisions relating to "special corporate transactions," *id.* § 23-7-1.1-31, or dissolution, *id.* § 23-7-1.1-33(2). Those sections respectively refer to the vote of "the members entitled to vote in respect thereof" and the vote of "a majority of the members entitled to vote thereon." *Id.* A proposed merger is an in-between category because under certain circumstances members not present at a meeting of the not-for-profit corporation would be entitled to vote as in cases of amendments to the articles. *Id.* § 23-7-1.1-42(b).

²⁹²*Id.* § 23-7-1.1-10 (Supp. 1979).

²⁹³*Id.* § 23-1-2-11(a)(1).

²⁹⁴Of course, the articles of such an organization can require that directors be members.

²⁹⁵IND. CODE § 23-7-1.1-12 (Supp. 1979).

²⁹⁶*Id.*

under the predecessor to the current act.²⁹⁷ Although there is not clear evidence that many not-for-profit corporations will adopt this alternative, there certainly is no harm in making it available.

3. *Executive Committees, Mergers and Consolidations.*—Public Law 234 is the third piece of legislation affecting the corporate area adopted during the 1979 session of the Indiana General Assembly.²⁹⁸ An amendment to the merger and consolidation provisions of the Indiana Act,²⁹⁹ to provide that shares and other securities or obligations of foreign as well as domestic corporations could be issued in connection with mergers or consolidations, was a noncontroversial but perhaps unnecessary change. The references to “any corporation” in the merger provision³⁰⁰ and to “any other corporation” in the consolidation provision,³⁰¹ which had been the operative language of the merger and consolidation provisions since 1969, were broad enough to include both domestic and foreign corporations. Nothing in these sections intimated that the shares, securities, or obligations had to be those of an Indiana corporation. By making the language express, though, the provisions eliminate a remote ground for an attack on a merger or consolidation because securities of a foreign corporation were issued.

In 1969 the drafters of the Model Act amended the merger and consolidation provisions³⁰² to permit the conversion of shares of merging or consolidating corporations into shares, other securities, or obligations of the surviving corporation, the new corporation, or “any other corporation.”³⁰³ It is difficult to believe that the revisers of the Model Act would have omitted the terms “domestic or foreign” while liberalizing the Act if they had any doubts about the sufficiency of the phrase “any other corporation.”³⁰⁴

²⁹⁷*Id.* § 23-7-1.1-17 (1971) (current version at *id.* § 23-7-1.1-12 (Supp. 1979)).

²⁹⁸Act of Apr. 10, 1979, Pub. L. No. 234, § 1, 1979 Ind. Acts 1106.

²⁹⁹IND. CODE §§ 23-1-5-2(a)(3), -3(a)(3) (1976 & Supp. 1979).

³⁰⁰*Id.* § 23-1-5-2(a)(3) (1976) (amended 1979).

³⁰¹*Id.* § 23-1-5-3(a)(3).

³⁰²MODEL BUS. CORP. ACT ANN. 2d §§ 71(c), 72(c) (1971).

³⁰³*Id.* Before the amendment, these sections only permitted conversion into shares, other securities, or obligations of the surviving or new corporation which, according to the comments, “seemed to be needlessly restrictive and out of harmony with modern practices.” *Id.* ¶ 2, at 352.

³⁰⁴The merger provision of the Indiana Financial Institutions Act, IND. CODE §§ 28-1-7-1 to -24 (1976), was amended in 1979 to permit the conversion of shares into those of “any other corporation.” Act of Apr. 6, 1979, Pub. L. No. 257, § 16, 1979 Ind. Acts 1283 (codified at IND. CODE § 28-1-7-2 (Supp. 1979)). The legislature did not use the current language of IND. CODE § 23-1-5-2 (Supp. 1979) as the model for the Indiana Financial Institutions Act, but instead used the language of § 23-1-5-2 as it existed prior to 1972. If the difference between the language of § 28-1-7-2 and § 23-1-5-2 (as amended) reflect a public policy, then only shares of domestic corporations can be issued in a merger of financial institutions. Of course, one possible

The wisdom of another provision of Public Law 234 can be questioned. The Act amends section 23-1-2-11(g) of the Indiana Act pertaining to executive and other committees of the board of directors. The new provision appears to be based in part on the 1975 revision of section 42 of the Model Act,³⁰⁵ but the provision goes beyond the Model Act in one significant respect.³⁰⁶ Under the Model Act, an executive committee has limited authority over the sale or issuance of securities in instances in which the board of directors generally has authorized the specific transaction in a resolution or by adoption of a stock option plan. Under the Indiana provision, however, complete authority may be given to an executive committee to sell or issue securities without any prior action by the board of directors.³⁰⁷

Such authority is not the kind that should be delegable to an executive committee. Apparently, this is the attitude of the drafters of the Model Act. The Model Act provides a standard that prohibits delegation of authority over actions "substantially affecting the rights of shareholders among themselves . . . matters of a character

explanation for the different language, which receives credence from the fact that § 28-1-7-11(c) of the Indiana Financial Institutions Act pertaining to consolidations of financial institutions was not amended at the same time, is poor legislative drafting in which obsolete language was used as a model.

³⁰⁵MODEL BUS. CORP. ACT ANN. 2d § 42 (Supp. 1977).

³⁰⁶Section 23-1-2-11(g) of the Indiana Act now provides in pertinent part:

[T]o the extent provided in the resolution, the articles of incorporation, or the by-laws, [an executive or other committee] may exercise all the authority of the board of directors including, but not limited to, the authority to issue and sell or approve any contract to issue and sell, securities or shares of the corporation or designate the terms of a series of a class of securities or shares. The terms which may be affixed by that committee include, but are not limited to, the price, dividend rate, and provisions of redemption, a sinking fund, conversion, voting, or preferential rights or other features of securities or class or series of a class of shares. The committee has full power to adopt a final resolution which sets forth those terms and to authorize a statement of terms to be filed with the secretary of state.

IND. CODE § 23-1-2-11(g) (1976 & Supp. 1979).

Section 42(viii) of the Model Act provides that

no . . . [executive] committee shall have authority to . . . authorize or approve the issuance or sale of, or any contract to issue or sell, shares or designate the terms of a series of a class of shares, provided that the board of directors, having acted regarding general authorization for the issuance or sale of shares, or any contract therefor, and in the case of a series, the designation thereof, may, pursuant to a general formula or method specified by the board by resolution or by adoption of a stock option or other plan, authorize a committee to fix the terms of any contract for the sale of the shares and to fix the terms [of the transaction]

MODEL BUS. CORP. ACT ANN. 2d § 42(viii) (Supp. 1977).

³⁰⁷Originally, § 42 of the Model Act appears to have *permitted* the delegation of such authority to an executive committee, but this authority was restricted in 1975. See MODEL BUS. CORP. ACT ANN. 2d § 42 ¶ 2 (Supp. 1977).

of immediate and irrevocable effect (such as the declaration of a dividend) . . . matters which may well become irrevocable without swift action, and . . . matters which will cause changes of position by others which cannot be rectified.”³⁰⁸ The Model Act recognizes that a decision to sell or issue securities is not one that the entire board of directors easily can reverse or rescind. Furthermore, the delegation of such a decision can aggravate the conflict created when one faction of a divided board controls the executive committee and uses the authority to further enhance its position in the corporation.³⁰⁹

Public Law 234 also amended the statutory restrictions on the authority of an executive committee. Six specific actions are beyond the authority of an executive committee.³¹⁰ These restrictions are similar to the restrictions of the Model Act,³¹¹ except in one respect. Whereas the Model Act prohibits an executive committee from approving or recommending to shareholders actions or proposals requiring shareholder approval, or from approving plans of merger not requiring shareholder approval,³¹² section 23-1-2-11(g), as amended, only prohibits an executive committee from approving a plan of merger or consolidation.³¹³ If the drafters of the new provision intended to parallel the Model Act, they managed to open a rather large gap. Under the Model Act, an executive committee cannot approve a merger, consolidation, or sale of all or substantially all of the corporation’s assets because such a sale requires shareholder approval. Under section 23-1-2-11(g)(3), mergers or consolidations cannot be approved by an executive committee, but a sale of all the assets of the corporation³¹⁴ can be recommended by an executive committee because there is no restriction pertaining to matters requiring shareholder approval. Before the 1979 amendment, section 23-1-2-11(g) restricted the executive committee from proposing special corporate transactions.³¹⁵ If the legislature intended to omit special corporate transactions, it again made an unwise decision because such transactions can substantially affect the rights of

³⁰⁸*Id.* Admittedly, the drafters of the Model Act permit the delegation of some authority to act with respect to matters arising outside the ordinary course of business, but the authority delegated by § 23-1-2-11(g) involves transactions that are more appropriately left to a determination by the entire board of directors.

³⁰⁹An executive committee may be prohibited from pursuing this type of action, however. There is authority that the issuance of shares simply to thwart a shift of control is a breach of fiduciary duty. *See, e.g., Condec Corp. v. Lunkenheimer Co.*, 43 Del. Ch. 353, 230 A.2d 769 (1967).

³¹⁰IND. CODE §§ 23-1-2-11(g)(1)-(6) (Supp. 1979).

³¹¹MODEL BUS. CORP. ACT ANN. 2d §§ 42(i)-(viii) (Supp. 1977).

³¹²*Id.* §§ 42(ii), (v).

³¹³IND. CODE § 23-1-2-11(g)(3) (1976 & Supp. 1979).

³¹⁴*Id.* §§ 23-1-6-1 to -5.

³¹⁵*Id.* § 23-1-2-11(g) (1976) (amended 1979).

shareholders. If the legislature did not so intend and felt that it was paralleling the restrictions of the Model Act, it can be charged with poor legislative drafting.³¹⁶

The basic procedures for establishing executive committees were also changed by Public Law 234. For some inexplicable reason, the phrase "or the bylaws" was added to the first sentence of section 23-1-2-11(g), which now reads:

Unless otherwise provided in the articles of incorporation or the bylaws, the board of directors may, by resolution adopted by a majority of the actual number of directors elected and qualified, from time to time, pursuant to a provision of the by-laws, designate from among its members and executive committee³¹⁷

The amendment is inexplicable because under the prior language an executive committee could be appointed pursuant to a bylaw, unless otherwise provided in the articles of incorporation. The new statute's provision that the authority to appoint an executive committee can be restricted by a bylaw provision is unnecessary because a bylaw provision is always essential for implementing the appointment of an executive committee. Under the old statute, if the corporation did not want an executive committee, it simply refused to adopt a bylaw. The added language is superfluous. The drafters of the Indiana legislation might have been influenced again by section 42 of the Model Act, which does refer to bylaws. If this was the case, the drafters failed to make a thorough reading of the Model Act, which authorizes the appointment of an executive committee if the articles of incorporation or the bylaws so provide.³¹⁸ The Indiana Act, in contrast, provides that the board of directors has the power to appoint an executive committee unless restricted by the articles of incorporation or the bylaws.³¹⁹

Finally, section 23-1-2-11(g) was amended by adding a paragraph that provides: "A member of the board of directors is not liable for

³¹⁶Unfortunately, the latter might be the case because *id.* § 23-1-2-11(g)(5) restricts an executive committee from authorizing or approving "the reacquisition of shares unless pursuant to a general formula or method specified by the board of directors," which is identical to § 42(vii) of the current version of the Model Act. There was no such restriction in the prior language of § 23-1-2-11(g). The drafters of the Model Act apparently considered the reacquisition transaction the mirror image of the issuance of shares, which is restricted. This further demonstrates the anomaly of permitting executive committees of Indiana corporations to approve and authorize security transactions unless restricted in the resolution, articles of incorporation, or bylaws.

³¹⁷IND. CODE § 23-1-2-11(g) (1976 & Supp. 1979).

³¹⁸MODEL BUS. CORP. ACT ANN. 2d § 42 (Supp. 1977).

³¹⁹IND. CODE § 23-1-2-11(g) (1976 & Supp. 1979).

any action taken by a committee if he is not a member of that committee and has acted in good faith and in a manner he reasonably believes is in the best interest of the corporation.”³²⁰ On its face, this provision appears less restrictive than the comparable language in section 42 of the Model Act.³²¹ The effect of the two provisions will probably be similar, however, because under section 42 a noncommittee director does not automatically incur liability if the executive committee action fails to meet the statutory standard of care.³²² Liability will probably depend on such factors as the care used in the delegation to and the surveillance of the executive committee and the knowledge about the particular matter available to the noncommittee director.³²³

³²⁰*Id.*

³²¹The Model Act provides:

Neither the designation of any such committee, the delegation thereto of authority, nor action by such committee pursuant to such authority shall alone constitute compliance by any member of the board of directors, not a member of the committee in question, with his responsibility to act in good faith, in a manner he reasonably believes to be in the best interests of the corporation, and with such care as an ordinarily prudent person in a like position would use under similar circumstances.

MODEL BUS. CORP. ANN. 2d § 42 (Supp. 1977).

³²²*Id.* ¶ 2. The comment to § 42 of the Model Act points out that directors may not abdicate their responsibilities and receive exoneration from liability simply by delegating authority to an executive or other committee of the board of directors. *Id.*

³²³*Id.*

VII. Criminal Law and Procedure

Alan Raphael*

A. Merger and Double Jeopardy

*Elmore v. State*¹ probably represents the most significant development in Indiana criminal law during the survey period. The Indiana Supreme Court decision reviewed the meaning of the double jeopardy clauses of the federal² and state constitutions³ and rejected Indiana precedent on the issue of factual merger.⁴

The defendants in *Elmore* had been convicted of theft⁵ and conspiracy to commit theft.⁶ The court of appeals affirmed the convictions but remanded the case to the trial court for vacation of the sentences for theft "in order to avoid double punishment."⁷ Although recognizing that theft was not a lesser included offense within the crime of conspiracy to commit theft, the court of appeals based its decision on the rule that multiple sentences are justified only when "the facts giving rise to the various offenses [are] independently supportable, separate and distinct."⁸

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¹382 N.E.2d 893 (Ind. 1978).

²U.S. CONST. amend. V.

³IND. CONST. art. 1, § 14.

⁴382 N.E.2d at 893-98.

⁵IND. CODE § 35-17-5-3 (1971) (repealed 1977).

⁶*Id.* § 35-1-111-1.

⁷375 N.E.2d 660, 667 (Ind. Ct. App.), *vacated*, 382 N.E.2d 893 (Ind. 1978).

⁸*Thompson v. State*, 259 Ind. 587, 592, 290 N.E.2d 724, 727 (1972), *quoted in* 375 N.E.2d at 667. This rule has been characterized as barring punishment for a "separate but related" crime even if the offenses charged were not identical. *Candler v. State*, 266 Ind. 440, 458, 363 N.E.2d 1233, 1243 (1977). Prior to the supreme court decision in *Elmore*, numerous cases in the survey period considered the issue of merger. *See, e.g.*, *Propes v. State*, 382 N.E.2d 910 (Ind. 1978) (murder and conspiracy to murder did not merge); *Cyrus v. State*, 381 N.E.2d 472 (Ind. 1978) (possession of drugs merged into sale); *Pallett v. State*, 381 N.E.2d 452 (Ind. 1978) (assault and battery with intent to kill did not merge into inflicting injury during a felony); *Reed v. State*, 379 N.E.2d 977 (Ind. 1978) (attempted armed felony merged into inflicting injury during a felony, but a conviction for kidnapping arising out of the same transaction was affirmed); *Pinkston v. State*, 377 N.E.2d 1355 (Ind. 1978) (armed robbery merged into inflicting injury during a robbery); *Kruckeberg v. State*, 377 N.E.2d 1351 (Ind. 1978) (possession of drugs normally merges into delivery of drugs, but did not merge under the peculiar circumstances of this case); *Roberts v. State*, 375 N.E.2d 215 (Ind. 1978) (arson merged into murder in the perpetration of arson); *Davis v. State*, 376 N.E.2d 545 (Ind. Ct. App. 1978) (assault and battery with intent to kill merged into first degree burglary).

The Indiana Supreme Court opinion considered the constitutional test for double jeopardy. *Blockburger v. United States*⁹ established the rule that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."¹⁰ This test was clarified in later cases decided by the United States Supreme Court¹¹ so that the *Blockburger* requirement is satisfied "[i]f each [offense] requires proof of a fact that the other does not . . . notwithstanding a substantial overlap in the proof offered to establish the crimes."¹²

The Indiana Supreme Court reasoned that while most Indiana decisions have been consistent with the double jeopardy test,¹³ other decisions have been incorrect.¹⁴ The court found that the doctrine of merger, which at common law required the prosecution to drop a misdemeanor charge if the same act constituted a felony of which the defendant was also charged, was not applicable to prosecutions for two felonies.¹⁵ The requirement that multiple offenses be separate and distinct was found to be "misleading in that it tends to shift the court's attention to the identity of the defendant's acts and away from the identity of the offenses he is charged with."¹⁶

As a result of the *Elmore* decision, the task of courts trying multiple charges arising out of the same transaction will no longer

⁹284 U.S. 299 (1932). The double jeopardy clause was held applicable to the states through the fourteenth amendment in *Benton v. Maryland*, 395 U.S. 784 (1969).

¹⁰284 U.S. at 304.

¹¹*Brown v. Ohio*, 432 U.S. 161 (1977); *Iannelli v. United States*, 420 U.S. 770 (1975).

¹²420 U.S. at 785 n.17, *quoted in* 432 U.S. at 166; 382 N.E.2d at 895.

¹³382 N.E.2d at 895 (citing *Williams v. State*, 373 N.E.2d 142 (Ind. 1978) (felony merged into felony murder); *Candler v. State*, 266 Ind. 440, 363 N.E.2d 1233 (1977) (felony merged into felony murder); *Bobbitt v. State*, 266 Ind. 164, 361 N.E.2d 1193 (1977) (armed robbery merged into inflicting injury during a robbery); *Hudson v. State*, 265 Ind. 302, 354 N.E.2d 164 (1976) (rape merged into conviction for armed rape); *Thomas v. State*, 264 Ind. 581, 348 N.E.2d 4 (1976) (attempted armed robbery merged into infliction of injury during an attempted robbery); *Swininger v. State*, 265 Ind. 136, 352 N.E.2d 473 (1976) (armed robbery merged into inflicting injury during a robbery); *Kokenes v. State*, 213 Ind. 476, 13 N.E.2d 524 (1938) (robbery merged into armed robbery)).

¹⁴382 N.E.2d at 897-98, *specifically overruling* *Jones v. State*, 369 N.E.2d 418 (Ind. 1977) (theft merged into second degree burglary); *Sansom v. State*, 366 N.E.2d 1171 (Ind. 1977) (theft merged into second degree burglary).

¹⁵382 N.E.2d at 895-96. The court stated:

It is evident, in light of the doctrine's history and purpose, that common law merger is an inadequate vehicle for resolving modern problems posed where multiple felonies arise from a single criminal act. Accordingly, any language in our decisions which could be read as giving new life to the merger doctrine is hereby disapproved.

Id. at 896.

¹⁶*Id.* at 897.

be to discover whether the crimes were related. Instead, the court will apply traditional double jeopardy analysis and allow prosecution for any charges which have at least one element that is not required to prove the other charges. The court will then sentence the offender for each of the offenses for which there has been a conviction. In addition to clarifying an important issue in Indiana criminal law, the *Elmore* decision will have other significant effects. It will add the threat of multiple charges to the weapons of the prosecution, a tool which likely will be used primarily during plea bargaining. Both during plea bargaining and when the court imposes sentences, defendants affected by this decision may feel the impact of the current Penal Code provision which allows courts to sentence offenders consecutively for each conviction.¹⁷

Although it is obviously too early to measure the effect of the *Elmore* decision on plea bargaining and sentencing practices, a few cases have subsequently applied that decision's double jeopardy analysis. In *Jones v. State*,¹⁸ the court of appeals held that convictions of both robbery¹⁹ and armed felony²⁰ did not violate double jeopardy.²¹ In *McFarland v. State*,²² the defendant had been convicted of assault and battery²³ and attempted armed robbery.²⁴ The court ordered the conviction of assault and battery to be vacated because all of the elements required to prove that crime constituted the violence element of attempted armed robbery.²⁵ Under the facts of these cases, their decisions are consistent with the *Elmore* rule.²⁶

¹⁷IND. CODE § 35-50-1-2 (Supp. 1979).

¹⁸387 N.E.2d 93 (Ind. Ct. App. 1979).

¹⁹IND. CODE § 35-13-4-6 (1976) (repealed 1977).

²⁰*Id.* § 35-23-4.1-2.

²¹387 N.E.2d at 95-96.

²²384 N.E.2d 1104 (Ind. Ct. App. 1979).

²³IND. CODE § 35-1-54-4 (1976) (repealed 1977).

²⁴*Id.* § 35-12-1-1. At trial, McFarland was in fact convicted of *consummated* armed robbery, although he was charged only with attempted armed robbery. The appellate court determined that conviction of an offense not charged and not qualifying as a lesser included offense of the one charged constituted a denial of due process. 384 N.E.2d at 1109. Consequently, the court corrected the verdict to conform to the charge of attempted armed robbery. *Id.* at 1110.

²⁵384 N.E.2d at 1113-14.

²⁶*Elmore* involved another issue. The defendants were convicted of both theft and conspiracy to commit theft. It is well established that such offenses are distinct and that, therefore, double jeopardy is not violated by sentences for the inchoate crime of conspiracy and the substantive crime. *Iannelli v. United States*, 420 U.S. 770 (1975). The practical effect of permitting convictions for both conspiracy and the common offense, however, will often be to allow two convictions instead of one for each defendant merely because two or more persons took part in the crime. While some conspiracies represent significant threats to the public safety, many conspiracies are of little consequence other than leading to commission of a crime that would have been committed

B. Right to Counsel

1. *Self-Representation*.—The Indiana Supreme Court in *Russell v. State*²⁷ held that a defendant seeking to exercise his *Faretta v. California*²⁸ right to represent himself at trial must do so “within a reasonable time prior to the day on which the trial begins.”²⁹ In *Russell*, the request for self-representation was made on the day of trial, before impaneling of the jury. The trial court ruled against the request without holding any hearing concerning Russell’s reasons for wanting to discharge his attorney or Russell’s ability to make a knowing, voluntary, and intelligent waiver of his right to counsel.³⁰ Whether the demand for pro se representation is timely will depend on a variety of factors: “[T]he type of trial at hand, and the nature and involvement of the pre-trial proceedings. The more complicated the case, and the more involved the pre-trial proceedings, the earlier a ‘reasonable’ assertion will naturally be, and vice-versa.”³¹ In *Faretta*, the request was made “weeks before trial”;³² the *Russell* court indicated that such an early request is not necessary.³³ The court distinguished two lines of decisions on this issue. The rejected approach finds a *Faretta* request timely if made before the jury is impaneled and sworn.³⁴ The “reasonable time prior to trial” approach which it adopted is that of *People v. Windham*,³⁵ a California

as readily by a single criminal. See Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 413 (1959). In proposing the Penal Code, the Indiana Criminal Law Study Commission considered barring convictions for any two of the following: Attempt, conspiracy, and a completed crime arising from the conspiracy or attempt. INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA PENAL CODE: PROPOSED FINAL DRAFT 71-72 (1974). As finally adopted, the Code allows convictions of both conspiracy and the completed crime, but not of attempt and the completed crime or of attempt and conspiracy. IND. CODE § 35-41-5-3 (Supp. 1979). Attempt and the completed crime obviously should not both lead to convictions because such a policy would convert every crime into two offenses. It is difficult to understand the logic that would bar convictions of both conspiracy and attempt, if conspiracy poses such significant dangers to the community regardless of whether the crime is ever attempted or completed, but would allow convictions of both conspiracy and the completed crime.

²⁷383 N.E.2d 309 (Ind. 1978).

²⁸422 U.S. 806 (1975).

²⁹383 N.E.2d at 314.

³⁰Both the right to counsel and the right to pro se representation are grounded in U.S. CONST. amend. VI. 422 U.S. at 818-21.

³¹383 N.E.2d at 315.

³²422 U.S. at 835.

³³383 N.E.2d at 314.

³⁴*Chapman v. United States*, 553 F.2d 886, 893-95 (5th Cir. 1977); *Sapienza v. Vincent*, 534 F.2d 1007, 1010 (2d Cir. 1976); *State v. Nix*, 327 So. 2d 301, 353-54 (La. 1975), *cert. denied sub nom. Fulford v. Louisiana*, 425 U.S. 954 (1976).

³⁵19 Cal. 3d 121, 127-29, 560 P.2d 1187, 1191-92, 137 Cal. Rptr. 8, 12-13, *cert. denied*, 434 U.S. 848 (1977). See also *Barnes v. State*, 258 Ark. 565, 570-72, 528 S.W.2d

Supreme Court decision. The *Windham* court stated that following an untimely request for pro se representation the trial court should inquire into the reasons underlying the request and should balance the defendant's interests against the interference with the trial to arrive at the decision.³⁶ While adopting the *Windham* test of reasonableness, the *Russell* court did not adopt the hearing requirement of *Windham*. In *Russell*, the court held that a hearing on pro se representation was necessary only after the defendant had made a request that was both unequivocal³⁷ and timely.³⁸ The court's rationale for barring day-of-trial *Faretta* motions was that it would avoid the potential for disruption and delay that such requests would create.³⁹ The disruption feared by the *Russell* majority may have been illusory because the trial court could have proceeded to trial immediately after holding a brief hearing to discover the defendant's reasons for wanting to represent himself, explaining the disadvantages of self-representation, and then deciding within its discretion whether to allow the defendant to represent himself at trial.

2. *Representation of Codefendants.*—*Hudson v. State*⁴⁰ applied the rule of *Martin v. State*⁴¹ that a court's appointment of the same

370, 374-75 (1975). Because the defendant in *Windham* waited to make his request for pro se representation until the third day of trial, the court had no need to rule as broadly as it did. The court could have held simply that the right of a defendant to discharge a counsel and proceed to represent himself is greatly diminished once the trial has begun. The decision most often cited for this rule is *United States ex rel. Maldonado v. Denno*, 348 F.2d 12 (2d Cir. 1965), *cert. denied sub nom. DiBlasi v. McMann*, 384 U.S. 1007 (1966), in which the court held that

[o]nce the trial has begun with the defendant represented by counsel, however, his right thereafter to discharge his lawyer and to represent himself is sharply curtailed. There must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance.

348 F.2d at 15.

³⁶19 Cal. 3d at 127-29, 560 P.2d at 1191-92, 137 Cal. Rptr. at 12-13.

³⁷*See Anderson v. State*, 370 N.E.2d 318 (Ind. 1977), *cert. denied*, 434 U.S. 1079 (1978).

³⁸383 N.E.2d at 315.

³⁹*Id.* In *German v. State*, 373 N.E.2d 880 (Ind. 1978), the Indiana Supreme Court faced a similar situation, except that in *German* the jury had been sworn before the defendant made a *Faretta* request. The court held that the trial court had properly refused a continuance to the defendant, lest "[a] defendant's freedom of choice of counsel . . . be used as a device to manipulate or subvert the orderly procedure of the courts." *Id.* at 883. The *German* court appeared to require that a hearing be held on the reasons for the *Faretta* request even if the request is made after the trial has begun.

⁴⁰375 N.E.2d 195 (Ind. 1978).

⁴¹262 Ind. 232, 238, 314 N.E.2d 60, 66 (1974). This rule is also recognized by decisions listed in *Martin. Id.* at 238 n.1, 314 N.E.2d at 66 n.1.

counsel for codefendants does not represent a denial of the constitutional guarantee of assistance of counsel in criminal trials⁴² unless the codefendants are shown to have conflicting interests.⁴³ Although joint representation of codefendants is not per se improper, courts apply a strict test to determine whether the right to counsel has been violated.⁴⁴

The appellant in *Hudson* and his codefendant Edwards were tried together, with representation by the same court-appointed counsel. Hudson was convicted of infliction of injury in the perpetration of a robbery, whereas Edwards was convicted of a lesser offense. On appeal, Hudson claimed to have been denied effective representation of counsel as a result of events at the close of the trial. After both sides had presented evidence, the court inquired whether either defendant would change his plea to guilty regarding a lesser offense. Edwards agreed to do so, but Hudson refused. The trial court accepted the changed plea and then called Edwards to the bench and asked him whether Hudson was telling the truth in denying his presence at the scene of the crime. Edwards said that Hudson was present at the scene. Upon receiving this answer, the trial court sentenced Edwards to one year in the Indiana State Farm and Hudson to life imprisonment.

The Indiana Supreme Court repeated the *Martin* rule⁴⁵ and then confused the issue involved here with the issue of competence of counsel:

However, the fact that one attorney is appointed to represent co-defendants does not establish either that his efforts were ineffective or that the defendant lacked undivided assistance of counsel. . . . We have consistently held that there is a strong presumption that counsel has competently discharged his duties. This presumption is overcome only by a showing that his actions were a mockery of justice, shocking to the conscience of the court.⁴⁶

⁴²U.S. CONST. amend. VI.

⁴³375 N.E.2d at 197.

⁴⁴*Glasser v. United States*, 315 U.S. 60 (1941): "Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness. . . . The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Id.* at 75-76. See generally Annot., 34 A.L.R.3d 470 (1970).

⁴⁵375 N.E.2d at 197. The court referred not to *Martin*, but to *United States v. Langston*, 194 F. Supp. 891 (W.D. Pa. 1961); this Article refers to *Martin* because it was an Indiana decision and was more recently decided than *Langston*.

⁴⁶375 N.E.2d at 197 (citation omitted).

This confusion of legal tests, noted by the dissent,⁴⁷ is clearly inconsistent with the stringent language of *Glasser v. United States*.⁴⁸ Although it is clear from the opinions in *Hudson* that the joint representation of Edwards and Hudson involved no conflicting loyalties for the attorney prior to the defense's resting of its case, an obvious conflict appeared subsequent to that time, and it then became improper for the attorney to continue as counsel for both defendants. It was in Edwards' interest to answer the court's question about Hudson's involvement in the crime—cooperation might have influenced the court to impose a mild sentence. It was in Hudson's interest to not have the court's question answered, because it amounted to an admission of evidence not subject to the right of cross-examination. A zealous attorney for Edwards would have welcomed the question, while a zealous attorney for Hudson would have objected to it. As the dissent recognized:

Trial counsel was placed in a position of divided allegiance by the question [A] criminal defendant who declines to plead guilty, wisely or unwisely, is entitled to a defense unhindered by his attorney's conflicting duty to safeguard a co-defendant's plea bargain. Appellant was denied this, and his conviction should therefore be reversed.⁴⁹

In another decision on this question, the Indiana Supreme Court in *Ross v. State*⁵⁰ ruled without direct precedent that it is not reversible error for a court to appoint partners in a law firm as counsel for separate codefendants with conflicting interests.⁵¹

It is rare for courts to reverse convictions on the ground of incompetency of defense counsel. For such a reversal, Indiana courts require a showing that the "actions or inactions of the attorney . . . made the proceedings a mockery of justice."⁵² This test has been modified by requiring "adequate legal representation at each stage of the proceeding."⁵³ The Indiana Supreme Court in *Cottingham v. State*⁵⁴ refused to adopt a standard of "reasonably competent assistance of an attorney acting as [a] diligent conscientious advocate."⁵⁵

⁴⁷*Id.* (DeBruler, J., dissenting).

⁴⁸315 U.S. 60, 75-76 (1941). The *Glasser* standard appears at note 44 *supra*.

⁴⁹375 N.E.2d at 198.

⁵⁰377 N.E.2d 634 (Ind. 1978).

⁵¹*Id.* at 637. The dissent would have reversed the conviction on the theory that the partners should be treated as a single counsel, whose representation of codefendants with conflicting legal needs would obviously have been a deprivation of the guarantee of assistance of counsel. *Id.* at 637-68 (DeBruler, J., dissenting).

⁵²*Cottingham v. State*, 379 N.E.2d 984, 986 (Ind. 1978).

⁵³*Id.* (quoting *Thomas v. State*, 251 Ind. 546, 557, 242 N.E.2d 919, 925 (1969)).

⁵⁴379 N.E.2d 984 (Ind. 1978).

⁵⁵*Id.* at 986 (quoting *United States v. DeCoster*, 159 U.S. App. D.C. 326, 331, 487 F.2d 1197, 1202 (1973)).

One decision during the survey period found incompetence of counsel. *Lyles v. State*⁵⁶ involved an appeal from a conviction for armed robbery. The prosecutor offered to recommend a sentence of one to five years if the defendant would plead guilty to theft. The defense counsel left the room and returned to inform the prosecutor and judge that Lyles would not agree to the bargain. The counsel told Lyles that no plea bargain had been offered by the prosecutor. Trial then led to conviction of an offense more serious than theft and a sentence of ten years.

The decision whether to plead guilty or stand trial is a right belonging to the accused.⁵⁷ The counsel's decision not to advise Lyles of the proposed plea bargain prevented Lyles from making an intelligent and knowing decision about pleading guilty or standing trial, and was thus held to represent a denial of "effective assistance of counsel at a critical stage of the proceedings."⁵⁸

C. Search and Seizure

The Indiana Court of Appeals ruled in *Clark v. State*⁵⁹ that the prosecution should be barred from introducing into evidence a search warrant when the defendant does not object to the introduction of the seized items.⁶⁰ This decision rejects the rule of *Mata v. State*⁶¹ and *George v. State*⁶² that "[a] conviction cannot be sustained where [the] search warrant under which the evidence had been obtained is not introduced in evidence The court erred in admitting the evidence of the officers, over appellant's objection."⁶³ The *Mata* rule, as noted by the *Clark* court, has continued to be accepted as valid by recent Indiana appellate decisions.⁶⁴ The *Clark* court, however, found that the *Mata* rule had served a special purpose which was no longer appropriate: it had afforded "protection against over-zealous enforcement of the Prohibition laws."⁶⁵

⁵⁶382 N.E.2d 991 (Ind. Ct. App. 1978).

⁵⁷*Id.* at 993 (citing *Abraham v. State*, 228 Ind. 179, 185, 91 N.E.2d 358, 360 (1950)).

⁵⁸382 N.E.2d at 994.

⁵⁹379 N.E.2d 987 (Ind. Ct. App. 1978).

⁶⁰*Id.* at 988-89. *Accord*, *Carey v. State*, 389 N.E.2d 357 (Ind. Ct. App. 1979).

⁶¹203 Ind. 291, 179 N.E. 916 (1932).

⁶²210 Ind. 592, 1 N.E.2d 583 (1936).

⁶³203 Ind. at 298, 179 N.E. at 918.

⁶⁴379 N.E.2d at 988 n.3 (citing *Hardin v. State*, 265 Ind. 179, 181, 353 N.E.2d 462, 463 (1976); *Roberts v. State*, 164 Ind. App. 354, 355, 328 N.E.2d 429, 430 (1975)).

⁶⁵379 N.E.2d at 988. While *Mata* was a Prohibition-era case charging unlawful possession of intoxicating liquors, *George* involved a prosecution for the crime of petit larceny. The *Clark* court erroneously referred to both decisions as involving the charge of unlawful possession of intoxicating liquors. *Id.* This error does not affect significantly the *Clark* court's arguments, although it does lessen the claim that the *Mata* rule was primarily based upon the experience with Prohibition laws.

In *Highsaw v. State*,⁶⁶ the Indiana Supreme Court considered the scope of a search warrant. A reliable informant told police that she saw heroin used and sold at Highsaw's residence. Based upon this information, a search warrant was issued to search the residence and Highsaw. Police officers approaching the residence saw Highsaw driving a car down the street, stopped him and, upon searching him, found heroin in his hand. The issue on appeal was whether the warrant justified the police search of Highsaw when he was not at the residence, or whether the warrant allowed a search of him only if present at the residence. The court found the warrant to be validly issued and to authorize the search of Highsaw at any place,⁶⁷ but the dissent argued that there was no probable cause for a search of the defendant and that such a search would be justified by the warrant only if it took place at the specified residence.⁶⁸

It is clear that the search would have been illegal had the warrant only authorized the search of the residence.⁶⁹ Although the warrant met the constitutional requirement of particularly describing the object of the search,⁷⁰ the problem was whether there was probable cause for the search of Highsaw's person. The evidence referred to by the court indicated only that there was probable cause to believe that heroin would be found at a residence alleged to be under the control of the defendant. The court recited no other connection between the defendant and the heroin, which was the object of the search, thus providing no probable cause to justify a warrant for the search of Highsaw apart from the search of the residence. Given this, and the lack of circumstances justifying a warrantless stop and search of Highsaw, the court should have excluded the seized heroin from evidence in the trial.⁷¹

D. Confessions and Admissions

In *Rogers v. State*,⁷² the Indiana Supreme Court weakened the protection accorded to defendants incriminated by the admission

The most significant rationales for the *Clark* decision are that the search warrant is relevant only to the court's decision on admissibility of evidence and that it and the probable cause affidavits often, as here, "contain statements highly prejudicial to the defendant." *Id.* at 989. The trial court's admonishment to the jury to disregard the prejudicial information rendered the error harmless. *Id.* While the *Mata* rule refers only to search warrants, the contents of the probable cause affidavit are significant because that affidavit is incorporated within the warrant. IND. CODE § 35-1-6-3 (1976).

⁶⁶381 N.E.2d 470 (Ind. 1978).

⁶⁷*Id.* at 471.

⁶⁸*Id.* at 472 (DeBruler, J., dissenting).

⁶⁹*United States v. Di Re*, 332 U.S. 581, 587 (1948).

⁷⁰U.S. CONST. amend. IV.

⁷¹*Mapp v. Ohio*, 367 U.S. 643 (1961).

⁷²375 N.E.2d 1089 (Ind. 1978).

into evidence of out-of-court statements made by codefendants not testifying at trial. Rogers was convicted of first degree murder and murder in the perpetration of a robbery, arising from a robbery by five men of a Gary, Indiana tavern and a killing which took place during the robbery. Four men were tried jointly for the crimes. A fifth man, James, testified for the State and implicated the four defendants by statements made prior to trial, although not at the trial itself. Statements of two codefendants, Stone and Williams, who did not testify at the trial, were admitted into evidence after deletion of the names and numbers of the codefendants as required by statute.⁷³ The court reasoned that the existence of numerous defendants made each statement less likely to implicate any other defendant than would be true if there were only two codefendants and that there was "a great deal of evidence"⁷⁴ against Rogers other than the codefendants' statements. Based on this reasoning, the court held that any error in admitting the statements was harmless.⁷⁵

The *Rogers* court distinguished the facts before it from those in *Sims v. State*,⁷⁶ decided in the previous year. In *Sims*, codefendants Sims and Irons were convicted of first degree murder. Each made a confession implicating the other, although each defendant accused the other of firing the shot which killed the victim. Instead of granting the defendants' motions for separate trials, the trial court deleted from each confession the name of the other defendant, either leaving

⁷³IND. CODE § 35-3.1-1-11(b) (1976) provides in part:

Whenever two (2) or more defendants have been joined for trial in the same indictment or information and one (1) or more defendants move for a separate trial because another defendant has made an out-of-court statement which makes reference to the moving defendant but is not admissible as evidence against him, the court shall require the prosecutor to elect one of the following courses:

- (1) a joint trial at which the statement is not admitted into evidence;
- (2) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted; or
- (3) granting the moving defendant a separate trial.

The statute was enacted as a response to the decision in *Bruton v. United States*, 391 U.S. 123 (1968). *Sims v. State*, 358 N.E.2d 746, 747 (Ind. 1977). In *Bruton*, the United States Supreme Court held that "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." 391 U.S. at 126. A confessing defendant may not bar introduction of a codefendant's confession implicating the first defendant. *Parker v. Randolph*, 439 U.S. 978 (1979).

⁷⁴375 N.E.2d at 1091.

⁷⁵*Id.* at 1090-91.

⁷⁶358 N.E.2d 746 (Ind. 1977).

a blank or inserting the letter "X." This was found insufficient to constitute the effective deletion required by the statute.⁷⁷ Although each of the confessions was admissible against the person who made it, the confessions could not be used against the codefendants. In *Sims*, no evidence was introduced other than the confessions, so their admission constituted reversible error.⁷⁸ The policy behind *Sims* was further discussed by the Indiana Supreme Court in *Carter v. State*:⁷⁹

In the case before us, as in *Sims* . . . , it probably was impossible to delete references to the declarants' co-defendants effectively and yet retain any semblance of the meanings. . . . In holding that the deletions made by the trial court were not "effective" we have regard for the policy pronounced in *Bruton* . . . , and that is that a co-defendant shall not be tainted by the out-of-court declarations of a non-testifying defendant. . . . [I]t will require more than a fig leaf to shield the non-declarants from the declarations of a declaring co-defendant. *In consequence, there probably will be but few such statements that are susceptible to effective deletion within the meaning of the statute.*⁸⁰

The *Rogers* court found the precedent of *Sims* unpersuasive for several reasons. First, the number of defendants in *Rogers* was greater than two: "Since the number involved is so large [four defendants, five perpetrators of the crime], the insertion from time to time of 'blank' does not necessarily incriminate anyone."⁸¹ Second, the amount of other evidence against Rogers made harmless any error in admitting the codefendants' statements. An eyewitness to the shooting identified Rogers. The victim had fired several shots and Rogers was wounded that night. Rogers had stated to police that he was shot at the tavern where the victim was shot during an exchange of gunfire with the robbers.

The dissent ably discussed the retreat made by the majority from the holdings in *Sims* and *Carter*. It rejected the argument that

⁷⁷*Id.* at 748 (referring to IND. CODE § 35-3.1-11(b) (1976)).

⁷⁸*Id.* at 747. It is clear that a violation of the *Bruton* rule can, despite its constitutional basis, be held to be harmless error. *Harrington v. California*, 395 U.S. 250 (1969). In *Harrington*, the Court found "the case against Harrington . . . so overwhelming that [it concluded that the] violation of *Bruton* was harmless beyond a reasonable doubt" and rejected the view that "a departure from constitutional procedures should result in an automatic reversal, regardless of the weight of the evidence." *Id.* at 254.

⁷⁹361 N.E.2d 145 (Ind. 1977).

⁸⁰*Id.* at 148 (emphasis added). The court found admission of the statements to be harmless error because "a jury could not have properly done other than convict." *Id.*

⁸¹375 N.E.2d at 1091.

the presence of numerous codefendants diminishes the harm to a defendant from introduction of the redacted statement.⁸² It further questioned the majority's holding that any error was harmless because there was ample evidence against Rogers other than the codefendants' confessions.⁸³ *Carter* had imposed a much more stringent standard for finding such error to be harmless:

To us, there is a vast difference between evidence that is ample, that is to say evidence that would prevail upon review over a claim of insufficiency, and evidence that is so convincing that a jury could not properly find against it. When we find the latter, we are warranted in a determination that error was harmless beyond a reasonable doubt.⁸⁴

Justice Prentice wrote the dissent in *Rogers*⁸⁵ and attempted to limit the *Rogers* holding in *Gutierrez v. State*:⁸⁶

Neither *Rogers v. State, supra*, its progeny, nor *Carter v. State, supra*, should be interpreted to render redaction, by substitution of a blank for a name, either appropriate or inappropriate, solely upon the basis of the number of participants in the events related or upon the number of defendants being tried jointly or sought to be tried jointly. Rather, the test is whether or not the proposed redaction is effective to shield a defendant from taint from the out-of-court declarations of a nontestifying defendant.⁸⁷

Another case decided in the past year also interpreted the statute governing admission of statements by nontestifying codefendants which implicate other defendants.⁸⁸ *Fox v. State*⁸⁹ involved a statement which implicated Fox without actually naming him. The court of appeals found that both the policy and language of *Bruton v. United States*⁹⁰ required application of the statute.⁹¹ The dissent argued that the statute proscribes references to the defendant, rather than inferences about the defendant.⁹² The majority reasoned that because the statute has repeatedly been held applicable to

⁸²*Id.* at 1092-93 (Prentice, J., dissenting). Another justice concurred on this point. *Id.* at 1093-94 (DeBruler, J., concurring).

⁸³*Id.* at 1093 (Prentice, J., dissenting).

⁸⁴361 N.E.2d at 148, *quoted in* 375 N.E.2d at 1093 (Prentice, J., dissenting).

⁸⁵375 N.E.2d at 1092-93 (Prentice, J., dissenting).

⁸⁶388 N.E.2d 520 (Ind. 1979).

⁸⁷*Id.* at 527.

⁸⁸IND. CODE § 35-3.1-1-11 (1976).

⁸⁹384 N.E.2d 1159 (Ind. Ct. App. 1979).

⁹⁰391 U.S. 123 (1968). *See* note 73 *supra*.

⁹¹384 N.E.2d at 1170-71.

⁹²*Id.* at 1176-77 (Buchanan, C.J., dissenting).

statements in which references to a defendant have been deleted, leaving only an inference prejudicing the defendant, the same policy should apply here, where there was never a direct reference to the defendant, but where there was a prejudicial inference.⁹³

E. Defendant's Presence at Trial

In two recent decisions, Indiana courts considered the effect of a defendant's absence from the courtroom during part of trial proceedings. The right of the accused to be present at trial is guaranteed by both the federal⁹⁴ and state constitutions,⁹⁵ and was guaranteed by a since-repealed Indiana statute.⁹⁶ An obvious exception is made where the defendant's conduct so interferes with the trial to prevent it from proceeding without removal of the defendant.⁹⁷ In *Howard v. State*,⁹⁸ the supreme court held that the defendant may waive his right to be present at trial.⁹⁹ The defendant, accused of being a habitual criminal, stated that he did not wish to be present during the trial of that charge. The trial then proceeded in his absence. The dissent argued that the right to be present at a trial is not merely a personal right of the defendant, and hence waivable, but also is designed to foster public confidence in the criminal justice system; therefore, the right should not be waivable even if the defendant freely and voluntarily chooses to be tried in absentia.¹⁰⁰

In *Skinner v. State*,¹⁰¹ the Indiana Supreme Court found no error

⁹³*Id.* at 1170-71 (quoting 361 N.E.2d at 148). A contrary result was reached by the supreme court after the survey period ended. The court in *Deaton v. State*, 389 N.E.2d 293 (Ind. 1979), although not citing *Fox*, appeared to adopt the same reasoning as Chief Judge Buchanan's dissent in *Fox*.

⁹⁴U.S. CONST. amend. VI.

⁹⁵IND. CONST. art. 1, § 13.

⁹⁶IND. CODE §§ 35-1-28-1 to -2 (1976) (repealed 1978).

⁹⁷*Illinois v. Allen*, 397 U.S. 337 (1970).

⁹⁸377 N.E.2d 628 (Ind. 1978), *cert. denied*, 99 S. Ct. 727 (1979). This decision is consistent with the holding of the United States Supreme Court in *Illinois v. Allen*, 397 U.S. at 342-43.

⁹⁹377 N.E.2d at 630. The majority discussed the issue very briefly and wrote that this rule was established by *Harris v. State*, 249 Ind. 681, 231 N.E.2d 800 (1967), *cited in* 377 N.E.2d at 630. The reliance on *Harris* was misplaced because that decision merely established that even if the defendant's right to be present at trial could be waived, that waiver must be given expressly by the defendant. 249 Ind. at 688, 231 N.E.2d at 804. *See also* *Miles v. State*, 222 Ind. 312, 319, 53 N.E.2d 779, 782 (1944). *Harris* never ruled on the propriety of a waiver in this situation, but did find the error to be harmless. 249 Ind. at 691-93, 231 N.E.2d at 804-06.

¹⁰⁰377 N.E.2d at 630-31 (DeBruler, J., dissenting). The dissent's argument was based on the statute, not the constitutional guarantees. This argument is of little value for the future because the statute has been repealed. Act of Mar. 9, 1978, Pub. L. No. 2, § 3555, 1978 Ind. Acts 2 (repealing IND. CODE §§ 35-1-28-1 to -2 (1976)).

¹⁰¹383 N.E.2d 307 (Ind. 1978).

in an instruction advising the jury that it could take into account the unexplained absence of the defendant from the conclusion of the trial.¹⁰² The instruction did not state that the defendant's absence implied guilt, but did allow the jury to draw any conclusions it might from the absence.¹⁰³ The dissent argued that the defendant's absence was irrelevant to a determination of guilt or innocence and thus should not have been the subject of any instruction.¹⁰⁴

F. Speedy Trial Rule

The decision in *Arch v. State*¹⁰⁵ represents a weakening of the speedy trial rule.¹⁰⁶ Arch was convicted of first degree murder and claimed on appeal that the trial court had erred in not granting him discharge pursuant to Criminal Rule 4(B)(1). Arch was incarcerated before trial and moved for an early trial on April 26, 1976. Absent any continuance or delay caused by his own acts, Arch was entitled to have his trial begin, pursuant to his motion, before July 5, 1976. On June 2, the court scheduled a readiness conference for June 28; however, the record failed to indicate that the defendant was notified of this conference. The June 28 conference was not held. On July 2, the court set Arch's trial for October 18. The readiness conference was held July 26. On August 31, the defendant filed for discharge, which was denied by the court on September 16. The trial commenced on December 13.

¹⁰²*Id.* at 308.

¹⁰³The instruction read as follows: "The failure of a defendant to appear for completion of his trial after the State has presented its case in prosecution of the defendant, is a circumstance which may be considered by you in connection with all the other evidence to aid you in determining his guilt or innocence." *Id.* at 309.

¹⁰⁴*Id.* (DeBruler, J., dissenting).

¹⁰⁵381 N.E.2d 465 (Ind. 1978).

¹⁰⁶IND. R. CR. P. 4(B)(1) provides:

If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar. Provided, however, that in the last mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as set forth in subdivision (A) of this rule.

IND. R. CR. P. 4(A) provides that no defendant shall be jailed before trial for more than six months without a trial, subject to exceptions involving delays or continuances by the defendant or congestion of the court calendar. IND. R. CR. P. 4(C) requires trials within one year of filing of charges, subject to similar exceptions. Together, these provisions constitute the "speedy trial" rules consistent with the constitutional requirement that "[j]ustice shall be administered . . . speedily, and without delay." IND. CONST. art. 1, § 12.

Arch contended that his right to a speedy trial was abridged on July 5, and thus his discharge should have been ordered. It is clear from the record that he was not responsible for any delays or continuances prior to that date. Had Arch acquiesced before July 5 in the setting of a trial date after that deadline, he would have been found to have waived his right to a speedy trial.¹⁰⁷ The Indiana Supreme Court found such acquiescence from two facts: (1) Arch knew that the scheduling of the readiness conference at such a short time before July 5 made it almost certain that the trial date would be set after that date, and (2) he failed to object to the court's schedule of proceedings before July 5.¹⁰⁸

The court supported this second rationale by reference to *Buchanan v. State*¹⁰⁹ and *Serrano v. State*.¹¹⁰ These cases fail to support the *Arch* decision because in *Buchanan* and *Serrano* the defendants failed to object to trial dates set before the speedy trial deadline had passed, whereas in *Arch* the defendant did not know the trial date until long after July 5 had passed. The argument that setting the initial readiness conference for June 28 notified the defendant that the trial would be set for a date after July 5 has two problems. First, the record does not show any notice to the defendant of the setting of the June 28 date; thus, he could not have been expected to have knowledge of the court's intentions.¹¹¹ Second, even if the defendant knew of the date scheduled for the conference, it was still possible for the court to schedule the trial after June 28, but before the expiration of the seventy-day period set by the speedy trial rule.

The applicability of Criminal Rule 4(B) to a person awaiting trial on a charge while incarcerated in Indiana on a prior offense was examined in *State v. Laslie*.¹¹² The defendant in *Laslie*, incarcerated on an unrelated charge, sought an early trial under Criminal Rule 4(B).¹¹³ Affirming the trial court's discharge of the indictment against

¹⁰⁷It has been stated that "[t]he waiver arises only where the defendant learns, within the period during which he could be properly brought to trial, that the court proposes trial on a date that is not timely. He then must object or he will be considered to have acquiesced." *Wilson v. State*, 361 N.E.2d 931, 934 (Ind. Ct. App. 1977) (citing *Bryant v. State*, 261 Ind. 172, 301 N.E.2d 179 (1973)).

¹⁰⁸381 N.E.2d at 467.

¹⁰⁹263 Ind. 360, 332 N.E.2d 213 (1975).

¹¹⁰266 Ind. 126, 360 N.E.2d 1257 (1977).

¹¹¹*Wilson v. State* established that the state has the duty to bring the defendant to trial within the times provided by the speedy trial rules and that the defendant does not have "the affirmative duty to discover what the court records might disclose. . . . To hold otherwise would, in fact, place upon him the burden of securing his right to speedy trial." 361 N.E.2d at 934.

¹¹²381 N.E.2d 529 (Ind. Ct. App. 1978).

¹¹³Although *Laslie* erroneously sought dismissal under IND. R. CR. P. 4(A), which was not applicable to his situation, the trial and appellate courts viewed the request as if it had been filed under IND. R. CR. P. 4(B). *Id.* at 530.

Laslie because his motion for speedy trial was not honored within the prescribed seventy-day limit, the Indiana Court of Appeals held that the early trial request should have been honored under the circumstances of the case.¹¹⁴ Although the rule is not applicable to persons serving prison sentences outside Indiana because of the administrative difficulties encountered in obtaining permission from the authorities of other states to try these persons in Indiana courts,¹¹⁵ the court found that these difficulties did not exist when the person was incarcerated in Indiana; therefore, Criminal Rule 4(B) applied.¹¹⁶

G. *Presence at Scene of Crime*

Presence of the defendant at the scene of a crime does not by itself justify the conclusion that the accused participated in the crime.¹¹⁷ However, presence may be considered together with other facts and circumstances to find guilt.¹¹⁸ The evidence in *Fox v. State*¹¹⁹ was held insufficient to justify conviction of four defendants allegedly present during the commission of arson.¹²⁰ Defendants Fox, Havens, York, Perry, and Kapp spent the evening drinking together at taverns in Grant County. At one tavern, Fox cursed police officer Mowery and made vague comments which might be construed as threats to him. Later during the night, a building that Mowery owned, which was close to his house, was burned down.¹²¹ Mowery's wife stated that she saw three men near where the blaze began and two

¹¹⁴*Id.* at 532.

¹¹⁵*Id.* See also *Hart v. State*, 260 Ind. 137, 140, 292 N.E.2d 814, 815-16 (1973); *Fossey v. State*, 254 Ind. 173, 180-81, 258 N.E.2d 616, 620 (1970).

¹¹⁶381 N.E.2d at 532. When the accused is incarcerated in Indiana, "the State has ready access to the accused and bringing him to trial will have no deleterious effect on the State administration of justice." *Id.*

¹¹⁷*Bond v. State*, 257 Ind. 95, 272 N.E.2d 460 (1971); *Conrad v. State*, 369 N.E.2d 1090 (Ind. Ct. App. 1977); *Pruitt v. State*, 333 N.E.2d 874 (Ind. Ct. App. 1975).

¹¹⁸*Simmons v. State*, 262 Ind. 300, 315 N.E.2d 368 (1974); *Cotton v. State*, 247 Ind. 56, 211 N.E.2d 158 (1965). As an exception to the rule that presence at the scene of the crime does not establish complicity, certain relationships between the defendant and the crime victim, such as a parent-child relationship, impose on a defendant present during the crime the duty to attempt to stop the criminal act. *Mobley v. State*, 227 Ind. 335, 85 N.E.2d 489 (1949).

¹¹⁹384 N.E.2d 1159 (Ind. Ct. App. 1979). Another aspect of this case is discussed *supra* at text accompanying notes 89-93.

¹²⁰*Id.* at 1165-66.

¹²¹The building was found to be "part or parcel of [the] dwelling house" as required by the arson statute. IND. CODE § 35-16-1-1 (1976) (repealed 1977). The court's discussion of the meaning of that phrase, 384 N.E.2d at 1162-63, continues to be relevant to the current statute, IND. CODE § 35-43-1-1 (Supp. 1979), although the current statute refers only to "dwelling" and omits the phrase "part or parcel."

others in the car.¹²² Her description of the car, which matched the one driven by the defendants; a footprint matching Kapp's, which was found at the scene of the crime; and other evidence made reasonable the jury's conclusion that some or all of the defendants were at the scene of the arson.

Assuming that the five defendants were all present at the Mowery property at the time of the fire and that Kapp's footprint conclusively established his presence outside the car near the building set on fire, the court faced two problems. One was that the evidence did not show whether those in the car were guilty of the offense charged.¹²³ The other was that the evidence failed to show which of the remaining defendants were in the car and which outside.¹²⁴

For a person to be convicted as an accessory or accomplice to a crime, it is necessary that the accused both knew that a felony was being committed and made some overt act in support of the felony.¹²⁵ Approval of the crime is insufficient to convict the accessory or accomplice unless communicated to the principal.¹²⁶ The court may infer aiding and abetting from "*failure to oppose [the crime] at the time, companionship with another engaged therein, and a course of conduct before and after the offense . . .*"¹²⁷ The *Fox* court found

¹²²Because the court reversed the convictions on other grounds, it did not have to consider whether the trier of fact could reasonably have believed Mrs. Mowery's testimony that three men were outside the car and two in it, when that testimony was first given at the trial 13 months after the crime and differed from her statement given the day after the crime, which mentioned only the three men outside the car. 384 N.E.2d at 1172 (Miller, J., concurring).

¹²³Although the offense charged was arson, the statute relevant to this question is that concerning accessories and accomplices. IND. CODE § 35-1-29-1 (1976) (repealed 1977). The issue in *Fox* continues to be significant under the current statute. See IND. CODE § 35-41-2-4 (Supp. 1979).

¹²⁴The court stated:

Because there is insufficient evidence to sustain the convictions of the two individuals that were inside the car, and since there is no evidence indicating who those individuals were, how can we, as an appellate court, pick and choose which of the four remaining appellants were inside that car? The answer is: We cannot. It is fundamental to our system of law that guilt is individual.

384 N.E.2d at 1166 (footnote omitted) (citing *Delgado v. United States*, 327 F.2d 641, 642 (9th Cir. 1964)).

¹²⁵*Pace v. State*, 248 Ind. 146, 148-49, 224 N.E.2d 312, 313-14 (1967).

¹²⁶*Id.* The defendant in *Pace* was the driver of a car in which one passenger robbed another. The defendant's conviction was reversed, even though the court found sufficient evidence to show that Pace knew that the crime was being committed, because no evidence showed Pace's involvement in the crime and Pace had no duty to try to stop its commission. *Id.* at 149, 224 N.E.2d at 314.

¹²⁷384 N.E.2d at 1174 (quoting 247 Ind. at 61-62, 211 N.E.2d at 161 (Buchanan, C.J., dissenting)).

that the evidence may have justified only a suspicion, not an inference, that the appellants knew of a criminal plan to commit arson.¹²⁸

H. Constructive Possession of Drugs

Several cases decided during the survey period involved the doctrine of constructive possession of illegal drugs. To establish a defendant's possession of the drugs, the State must show an "intent and capability to maintain control and dominion"¹²⁹ over the substance. The intent element is bifurcated, requiring proof that the defendant knew of the presence of the drug and of its character.¹³⁰ Although such intent will be inferred if the accused had exclusive possession of the place where the drugs were found,¹³¹ additional evidence of incriminating statements or circumstances is required when the possession was nonexclusive.¹³²

Two appellate decisions considered what evidence would be sufficient to justify the inference of intent in cases of nonexclusive possession of drugs. In *Edwards v. State*,¹³³ the defendant Edwards shared an apartment with his brother and the latter's girl friend. Pursuant to a valid search warrant for controlled substances, police entered the apartment and discovered amphetamines in the refrigerator. Edward's conviction for possession of a controlled substance was reversed for lack of "evidence from which the reasonable inference could be drawn that Tim Edwards knew of the amphetamines and had control of them."¹³⁴ Among the kinds of evidence which would have supported that inference would have been proof of attempted escape or destruction of contraband, confession, close proximity of the defendant to drugs in plain view, or resistance to the police.¹³⁵

¹²⁸384 N.E.2d at 1166.

¹²⁹*Thomas v. State*, 260 Ind. 1, 4, 291 N.E.2d 557, 558 (1973) (citing *People v. Fox*, 24 Ill. 2d 581, 585, 182 N.E.2d 692, 694 (1962)); *Greely v. State*, 158 Ind. App. 212, 215, 301 N.E.2d 850, 851-52 (1973).

¹³⁰*Martin v. State*, 372 N.E.2d 1194 (Ind. Ct. App. 1978).

¹³¹260 Ind. at 5, 291 N.E.2d at 559 (quoting *Feltes v. Colorado*, 178 Colo. 409, 414-15, 498 P.2d 1128, 1131 (1972)); *Martin v. State*, 372 N.E.2d at 1198; *Phillips v. State*, 160 Ind. App. 647, 651, 313 N.E.2d 101, 103-04 (1974).

¹³²*Greely v. State*, 158 Ind. App. at 215, 301 N.E.2d at 852: "[The inference that the homeowner possessed the contraband must be supported by] some evidence to show that he had at least some knowledge of the presence of the material." See generally Annot., 56 A.L.R.3d 948 (1974).

¹³³385 N.E.2d 496 (Ind. Ct. App. 1979).

¹³⁴*Id.* at 497.

¹³⁵*Id.* at 498. See, e.g., *Ledcke v. State*, 260 Ind. 382, 386, 296 N.E.2d 412, 416 (1973) (large quantities of marijuana found being processed and defendant's attempted flight); *Hutcherson v. State*, 381 N.E.2d 877, 879 (Ind. Ct. App. 1978) (defendant's flight

*Johnson v. State*¹³⁶ indicated other kinds of evidence which might support the inference that a person in possession of premises is also constructively in possession of drugs found therein. Police with a valid warrant searched the home in which Pinner, Johnson, and several other persons lived. The officers found traces of heroin and materials used to inject heroin in the room shared by Johnson and Pinner, as well as in the upstairs bathroom where Pinner was having her hair groomed at the time of the search. The prosecution failed to prove any of the following factors which might have led to affirming Pinner's conviction:

[T]hat she was under the influence of any drug, nor were any unused packets of heroin found secreted in the house . . . that she knew of the presence of the discarded paraphernalia or that the contents of the wastebaskets were in plain view, or that Pinner would recognize either the nature of the residue or the significance of the empty packets. In addition, she apparently did not attempt to flee, or attempt to conceal the wastebaskets or their contents, or behave in any way as if she had guilty knowledge.¹³⁷

In *Ingle v. State*,¹³⁸ the Indiana Court of Appeals used the doctrine of constructive possession of drugs as justification for police officers to search an entire house. In *Ingle*, police legitimately in a house saw marijuana in plain view and made arrests. Based upon their suspicion that other persons might be in the house and the fact that those other persons might be found to have constructive possession of the discovered marijuana, the police were held entitled to look through the house for other persons.¹³⁹ Because this extensive search was valid, the prosecution was able to introduce into evidence the large amount of marijuana found by the police in plain view in the basement.

I. Sudden Heat in Manslaughter

Cases during the survey period considered whether sudden heat

and drugs in plain view); *Cooper v. State*, 357 N.E.2d 260, 265 (Ind. Ct. App. 1976) (contraband found on front seat of car which defendant had just been driving); *Mills v. State*, 163 Ind. App. 608, 613, 325 N.E.2d 472, 474-75 (1975) (methadone in plain view); *Puckett v. State*, 163 Ind. App. 258, 262, 322 N.E.2d 716, 718-19 (1975) (defendant's misrepresentation of identity when receiving a trunk containing marijuana and possession of the combination to the trunk); *Thurman v. State*, 162 Ind. App. 267, 278-79, 319 N.E.2d 151, 157-58 (1974) (defendant's admission and location of a substantial quantity of drugs under pillow on defendant's bed).

¹³⁶376 N.E.2d 542 (Ind. Ct. App. 1978).

¹³⁷*Id.* at 544.

¹³⁸377 N.E.2d 885 (Ind. Ct. App. 1978).

¹³⁹*Id.* at 889.

is an element necessary for conviction of manslaughter¹⁴⁰ and whether a judge can properly instruct a jury about manslaughter absent any proof of sudden heat.¹⁴¹ Although both decisions arose from prosecutions under pre-Penal Code statutes,¹⁴² their rulings are pertinent to similar provisions under current laws.¹⁴³

Although both prior and current statutes define manslaughter as including sudden heat, Indiana courts have held that proof of sudden heat is not an element of the crime,¹⁴⁴ but rather serves to reduce what otherwise would have been murder to a lesser crime.

In *Neff v. State*,¹⁴⁵ the defendant was charged with voluntary manslaughter and found guilty of beating to death his stepdaughter. The beating appeared to have lasted several hours and to have included hitting, whipping, knocking her head against the floor, and attempted drowning. Neff claimed that the State had failed to show either a sudden heat or adequate provocation for sudden heat, thus rendering his conviction improper. The appellate court held that sudden heat serves only as a means of disproving the element of malice in the crime of murder and must automatically be found when malice is either disproved or not alleged: " '[F]or there could be no such thing as an unlawful intentional killing without malice, unless it was done upon a sudden heat.' "¹⁴⁶ The court also noted that the State conceded there was no malice and that there was "evidence of anger and sudden resentment of appellant against the deceased"¹⁴⁷ and other factors justifying a reasonable inference that the crime had been committed "without malice in a sudden heat."¹⁴⁸

In *O'Conner v. State*,¹⁴⁹ the Indiana Court of Appeals recognized that it was bound to follow the rule that sudden heat was not an ele-

¹⁴⁰*Neff v. State*, 379 N.E.2d 473 (Ind. Ct. App. 1978).

¹⁴¹*O'Conner v. State*, 382 N.E.2d 994 (Ind. Ct. App. 1978).

¹⁴²IND. CODE § 35-13-4-2 (1976) (repealed 1977) provided in part: "Whoever voluntarily kills any human being without malice, expressed or implied, in a sudden heat, is guilty of manslaughter"

¹⁴³IND. CODE § 35-42-1-3 (Supp. 1979) provides: "(a) A person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter (b) The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder under section 1(1) of this chapter to voluntary manslaughter."

¹⁴⁴*Holloway v. State*, 352 N.E.2d 523 (Ind. Ct. App. 1976). The Indiana Supreme Court, in dictum, in *McDonald v. State*, 264 Ind. 477, 346 N.E.2d 569 (1976), indicated: "[I]f sufficient evidence is presented to the jury by which it could find murder in the first or second degree, the jury may also return a verdict of guilty of voluntary manslaughter, notwithstanding the absence of proof of 'sudden heat.'" *Id.* at 483, 346 N.E.2d at 574. See also *Neff v. State*, 379 N.E.2d at 479.

¹⁴⁵379 N.E.2d 473 (Ind. Ct. App. 1978).

¹⁴⁶*Id.* at 479 (quoting *Hasenfuss v. State*, 156 Ind. 246, 249, 59 N.E. 463, 465 (1901)).

¹⁴⁷379 N.E.2d at 480.

¹⁴⁸*Id.*

¹⁴⁹382 N.E.2d 994 (Ind. Ct. App. 1978).

ment of manslaughter,¹⁵⁰ but found error in the trial court's instructing the jury, in a trial for second degree murder, that it could find O'Conner guilty of voluntary manslaughter despite the absence of any evidence showing sudden heat.¹⁵¹ The court reasoned that an instruction is proper only if there is evidence to support it¹⁵² and that the evidence in this case failed to show sudden heat, which is required to prove voluntary manslaughter.¹⁵³ This argument appears to contradict the court's earlier grudging acceptance of the validity of the conviction for voluntary manslaughter without proof of sudden heat. Although a reasonable argument can be made for the proposition that sudden heat should be considered an element of voluntary manslaughter, once that claim has been rejected it appears logical that proof of murder can justify a manslaughter conviction and that a court can properly instruct to that effect.

J. Rape Shield Law

Several decisions within the survey period upheld the constitutionality of Indiana's rape shield law.¹⁵⁴ In addition, the 1979 Indiana General Assembly amended the law to extend its protection to the reputations of witnesses other than the victim of the alleged sex crime.¹⁵⁵

Rape shield statutes have been enacted by many states within the last decade.¹⁵⁶ Their purpose is to eliminate the embarrassment suffered by victims of sexual assaults upon cross-examination about their unrelated sexual activities prior to the alleged rape or other sex crime. Proponents of these statutes hoped to "protect a prosecutrix from . . . baseless, irrelevant, and grotesque harassments,"¹⁵⁷ and to encourage victims of sex offenses to report the crimes, free of the fear of being harassed or humiliated when put on the witness stand. Indiana's statute,¹⁵⁸ enacted in 1975, bars the admission of or reference to evidence of past sexual conduct of a vic-

¹⁵⁰*Id.* at 1000.

¹⁵¹*Id.* at 1001.

¹⁵²*Id.* (quoting *Hash v. State*, 258 Ind. 692, 698, 284 N.E.2d 770, 774 (1972)).

¹⁵³382 N.E.2d at 1000.

¹⁵⁴IND. CODE §§ 35-1-32.5-1 to -4 (Supp. 1979).

¹⁵⁵Act of Apr. 2, 1979, Pub. L. No. 289, 1979 Ind. Acts 1481 (codified at IND. CODE §§ 35-1-32.5-1 to -4 (1976 & Supp. 1979)).

¹⁵⁶For a good discussion of the recent changes in law and public perceptions of the crime of rape, see Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977). See *id.* at 32 n.196 for a list of the rape shield statutes throughout the nation.

¹⁵⁷*Roberts v. State*, 373 N.E.2d 1103, 1107 (Ind. 1978).

¹⁵⁸Act of Apr. 11, 1975, Pub. L. No. 322, 1975 Ind. Acts 1768 (codified as amended at IND. CODE §§ 35-1-32.5-1 to -4 (1976 & Supp. 1979)).

tim of an alleged sex crime, except under limited circumstances.¹⁵⁹

The defendant in *Roberts v. State*¹⁶⁰ claimed that the statute unconstitutionally discriminated by sex, violated his right to confront witnesses,¹⁶¹ and represented an improper interference by the legislature with the judicial process. The Indiana Supreme Court summarily rejected all of these arguments.¹⁶² The constitutionality of the statute was again upheld, with a fuller discussion of the issues, by the court in *Lagenour v. State*.¹⁶³ In *Lagenour*, the defendant, who was accused of kidnapping and assault and battery with intent to gratify sexual desires, sought to introduce evidence of past sexual activities of the prosecuting witness and of two other witnesses who had testified that the defendant had on unrelated occasions assaulted them sexually. The trial court refused to admit such evidence. The supreme court ruled that the statute did not apply to all of the proposed lines of questioning but that the trial court's exercise of its discretionary power to exclude evidence did not violate the defendant's rights to due process and confrontation.¹⁶⁴ The court found no indication that the judge's application of the statute foreclosed the defense counsel from any line of questions which would otherwise have been admissible in evidence.¹⁶⁵

As the court reasonably construed the statute, "the rape shield law does not apply to victims of separate crimes nor to the victim of a kidnapping."¹⁶⁶ The general assembly acted promptly to remove one of these limitations. It amended the rape shield law so that it now restricts admission of evidence of the past sexual conduct not only of the victim of the sexual assault, but also of any "witness other than the accused."¹⁶⁷

The defendant in *Finney v. State*¹⁶⁸ raised numerous constitutional objections to the rape shield law; among them were claims of violations of his rights to confront witnesses and to equal protection of the laws.¹⁶⁹ The court of appeals rejected the confrontation clause

¹⁵⁹The exceptions allow admission for purposes of impeachment of any felony conviction arising out of prior sexual acts which the court, after an in camera proceeding, determines to be material and to have probative value which outweighs its inflammatory or prejudicial nature. See IND. CODE §§ 35-1-32.5-1 to -4 (1976 & Supp. 1979).

¹⁶⁰373 N.E.2d 1103 (Ind. 1978).

¹⁶¹U.S. CONST. amend. VI; IND. CONST. art. 1, § 13.

¹⁶²373 N.E.2d at 1107.

¹⁶³376 N.E.2d 475 (Ind. 1978).

¹⁶⁴*Id.* at 479.

¹⁶⁵*Id.*

¹⁶⁶*Id.*

¹⁶⁷Act of Apr. 2, 1979, Pub. L. No. 289, 1979 Ind. Acts 1481 (codified at IND. CODE §§ 35-1-32.5-1 to -4 (1976 & Supp. 1979)).

¹⁶⁸385 N.E.2d 477 (Ind. Ct. App. 1977).

¹⁶⁹U.S. CONST. amend. XIV.

argument on the authority of *Lagenour* and *Roberts*.¹⁷⁰ Although the right to confrontation would have been abridged if the trial court had barred the defense from presenting all impeachment evidence concerning the victim in this rape trial,¹⁷¹ the appellate court found that this partial limitation did not violate the confrontation clause.¹⁷² As to the claimed breach of the equal protection clause, the court found that rape defendants are not a suspect classification and that the State need therefore prove only that the statute has a rational and reasonable basis for the classification which discriminated against them.¹⁷³ The legislature's finding that the statute was needed to protect rape victims from embarrassment and to encourage them to report the crimes provided such a basis.

K. Sentencing

The decision in *Perry v. State*¹⁷⁴ clarifies an issue regarding consecutive sentencing of convicted offenders in Indiana. By statute, the trial court must decide whether terms of imprisonment imposed for more than one conviction should be imposed concurrently or consecutively;¹⁷⁵ there is, however, one circumstance under which the court is required to impose consecutive sentences.¹⁷⁶ The exception occurs when a crime is found to have been committed by a person who has previously been arrested for another crime and who has not been discharged from probation, parole, or imprisonment from the first crime by the time of the commission of the second offense. The main impetus behind passage of this exception was undoubtedly to make more severe the penalties received by persons released from jail on bond or on their own recognizance who are accused of a subsequent crime while awaiting trial on the former charge, and

¹⁷⁰385 N.E.2d at 479-80.

¹⁷¹*Davis v. Alaska*, 415 U.S. 308 (1974); *U.S. v. Duhart*, 511 F.2d 7 (6th Cir. 1975); *Snyder v. Coiner*, 510 F.2d 224 (4th Cir. 1975); *U.S. v. Harris*, 501 F.2d 1 (9th Cir. 1974).

¹⁷²385 N.E.2d at 479 (citing *Brooks v. State*, 259 Ind. 678, 291 N.E.2d 559 (1973); *Borosh v. State*, 166 Ind. App. 378, 336 N.E.2d 409 (Ind. Ct. App. 1975)).

¹⁷³385 N.E.2d at 480.

¹⁷⁴379 N.E.2d 531 (Ind. Ct. App. 1978).

¹⁷⁵IND. CODE § 35-50-1-2(a) (Supp. 1979) provides: "Except as provided in subsection (b) of this section, the court shall determine whether terms of imprisonment shall be served concurrently or consecutively." It is likely that judges will make this determination upon criteria similar to those listed in *id.* § 35-4.1-4-7 for determining whether a crime is aggravated or mitigated for purposes of deciding upon a sentence.

¹⁷⁶*Id.* § 35-50-1-2(b) provides:

If a person commits a crime: (1) after having been arrested for another crime; and (2) before the date he is discharged from probation, parole, or a term of imprisonment imposed for that other crime; the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

who are convicted of both charges. A less frequent use of this statute involves crimes committed by persons incarcerated at the time of the subsequent crime. The defendant in *Perry* was convicted of eight counts of attempted forgery and attempted possession of controlled substances.¹⁷⁷ Because Perry was on parole at the time of the instant crimes, the statute applied regarding mandatory consecutive sentences. The trial judge interpreted the statute as requiring him to sentence Perry to eight consecutive terms, to run upon the termination of the sentence for which he had been on parole. The court of appeals rejected this interpretation of the statute, holding instead that the judge was required to make the sentences on the new convictions begin at the termination of the prior sentence, but that the judge had discretion in determining whether the new sentences were to be served consecutively.¹⁷⁸

L. Legislative Developments

Several other changes in Indiana criminal law were made by the legislature in 1979. Penalties outside Title 35 of the Indiana Code were changed to fit within the classifications of the Penal Code.¹⁷⁹ Receipt, retention, or disposal of stolen property was made a separate offense¹⁸⁰ instead of being within the definition of theft,¹⁸¹

¹⁷⁷The appellate court found that the evidence supported only one conviction of attempted possession of a controlled substance. 379 N.E.2d at 533.

¹⁷⁸*Id.* at 534-35.

¹⁷⁹Act of Apr. 6, 1979, Pub. L. No. 87, §§ 1, 2, & 4-5, 1979 Ind. Acts 390. The Penal Code contains the substantive criminal law of Indiana and was enacted in 1976. Indiana Penal Code, Pub. L. No. 148, 1976 Ind. Acts 718 (codified at IND. CODE §§ 35-44 to -50 (Supp. 1979)). All prohibited acts with attendant penalties are grouped into four classes of felony, IND. CODE §§ 35-50-2-4 to -7 (Supp. 1979); murder, *id.* § 35-50-2-3; three classes of misdemeanor, *id.* §§ 35-50-3-2 to -4; and three classes of infractions, *id.* §§ 35-50-4-2 to -4. The infractions covered by the 1979 act involve regulation of motor carriers, Act of Apr. 6, 1979, Pub. L. No. 87, § 1, 1979 Ind. Acts 390 (codified at IND. CODE § 8-2-7-41 (Supp. 1979)); issuance of motor vehicle licenses, Act of Apr. 6, 1979, Pub. L. No. 87, § 2, 1979 Ind. Acts 390 (codified at IND. CODE § 9-1-4-37 (Supp. 1979)); and endangered species, Act of Apr. 6, 1979, Pub. L. No. 87, §§ 4-5, 1979 Ind. Acts 390 (codified at IND. CODE §§ 14-2-8.5-4, -7 (Supp. 1979)).

¹⁸⁰Act of Apr. 2, 1979, Pub. L. No. 300, § 2(b), 1979 Ind. Acts 1491 (codified at IND. CODE § 35-43-4-1 (Supp. 1979)): "A person who knowingly or intentionally receives, retains, or disposes of the property of another person that has been the subject of theft commits receiving stolen property, a Class D felony."

¹⁸¹IND. CODE § 35-43-4-2(a) (Supp. 1979). In proposing the consolidation of numerous crimes into a single crime of theft, the Indiana Criminal Law Study Commission criticized prior law as "duplicitous and cumbersome." INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA PENAL CODE: PROPOSED FINAL DRAFT 98 (1974) [hereinafter cited as PENAL CODE: PROPOSED FINAL DRAFT]. The statute prior to enactment of the Penal Code required proof of "knowingly . . . obtain[ing] control over stolen property knowing the property to have been stolen by another" IND. CODE § 35-17-5-3(1)(f) (1976)

and the definition of prostitution was enlarged to cover massage parlor activities not previously covered.¹⁸² Penalties were increased for batteries against children¹⁸³ and for violations of firearms regula-

(repealed 1977). The Penal Code requirement that the person "knowingly or intentionally exerts unauthorized control over property of another person . . .," *id.* § 35-43-4-2(a) (Supp. 1979), changed the prior statute's requirement that the holder of stolen property must know that it was stolen; the Indiana Criminal Law Study Commission commented that this was a relaxation of the requirement but that it was "not dispensed with entirely since the actor under the proposed chapter must know or have a firm belief that the control he is exerting is unauthorized." PENAL CODE: PROPOSED FINAL DRAFT 99. It is doubtful if the 1979 statute changes the requirements for conviction of receipt of stolen property. The wording could be read as requiring that one "knowingly or intentionally receives, retains, or disposes of the property of another," and that the property be shown to be stolen, without any proof that the person charged knew that it was stolen. Act of Apr. 2, 1979, Pub. L. No. 300, § 2(b), 1979 Ind. Acts 1491 (codified at IND. CODE § 35-43-4-1 (Supp. 1979)). The culpability section, IND. CODE § 35-41-2-2 (Supp. 1979), provides that the standard of culpability, here "knowingly or intentionally," applies to "every material element of the prohibited conduct." Thus the logical reading of the 1979 amendment is that the State would have to prove the accused's knowledge that the property was stolen, as well as the knowing or intentional receipt, retention, or disposition of the property.

¹⁸²Act of Apr. 10, 1979, Pub. L. No. 301, 1979 Ind. Acts 1493 (codified at IND. CODE § 35-45-4-2 (Supp. 1979)). Added to the definition of prostitution is receiving payment for fondling or agreeing to fondle the genitals of another person. The same acts are added to the definition of patronizing a prostitute. Act of Apr. 10, 1979, Pub. L. No. 301, 1979 Ind. Acts 1493 (codified at IND. CODE § 35-45-4-3 (Supp. 1979)). This statute is designed to allow for prosecution of acts alleged to be performed frequently at massage parlors. The other criminal statute that has been used to prosecute such acts concerns public indecency, which covers "(a) [a] person who knowingly or intentionally, in a public place: . . . (4) fondles the genitals of himself or another person . . ." IND. CODE § 35-45-4-1 (Supp. 1979). A problem with applying that statute to the massage parlor situation is that arguably a massage parlor is not a public place. Other means have been attempted by governmental authorities to restrict the operations of massage parlors. The Indiana Supreme Court in *City of Indianapolis v. Wright*, 371 N.E.2d 1298 (Ind. 1978), upheld an Indianapolis ordinance, INDIANAPOLIS-MARION COUNTY, IND., CODE § 17-729 (1975), which, among other provisions, prohibited persons employed at massage parlors from touching or offering to touch the genital or sexual area of any person. For a discussion of constitutional issues involved in the Indianapolis ordinance, see *Constitutional Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 69, 73-76 (1979). Another method of attacking these establishments would be to claim that they constitute public nuisances and attempt to close them as a result. See Fahringer & Cambria, *The New Weapons Being Used in Waging War Against Pornography*, 7 CAPITOL U. L. REV. 553 (1978); Hogue, *Regulating Obscenity Through the Power to Define and Abate Nuisances*, 14 WAKE FOREST L. REV. 1 (1978); *Porno non est pro bono publico: Obscenity as a Public Nuisance in California*, 4 HASTINGS CONST. L.Q. 385 (1977); *Restricting the Public Display of Offensive Materials: The Use and Effectiveness of Public and Private Nuisance Actions*, 10 U.S.F.L. REV. 232 (1975); *Can an Adult Theater or Bookstore Be Abated as a Public Nuisance in California?*, 10 U.S.F.L. REV. 115 (1975).

¹⁸³Act of Apr. 4, 1979, Pub. L. No. 298, 1979 Ind. Acts 1490 (codified at IND. CODE § 35-42-2-1 (Supp. 1979)).

tions committed by persons with prior felony convictions within fifteen years,¹⁸⁴ and sentences were made nonsuspendible for several drug-related offenses.¹⁸⁵ Persons sentenced to life sentences have, with one exception, been made eligible for parole.¹⁸⁶ Trial courts have been stripped of their discretionary authority to allow persons convicted of serious crimes to be free on recognizance pending sentencing or appeal.¹⁸⁷

¹⁸⁴Act of Apr. 9, 1979, Pub. L. No. 295, 1979 Ind. Acts 1486 (codified at IND. CODE § 35-23-4.1-18 (Supp. 1979)).

¹⁸⁵Act of Apr. 11, 1979, Pub. L. No. 305, 1979 Ind. Acts 1513 (codified at IND. CODE § 35-50-2-2 (Supp. 1979)).

¹⁸⁶Act of Apr. 2, 1979, Pub. L. No. 119, 1979 Ind. Acts 486 (codified at IND. CODE § 11-1-1-9.1 (Supp. 1979)). Prior to enactment of the Penal Code, persons convicted of murder or of several other crimes were sentenced to terms of life imprisonment. They were never subject to release on parole unless granted clemency by the governor. IND. CONST. art. 5, § 17. All persons sentenced under the Penal Code receive determinate sentences, except for those sentenced to death. IND. CODE §§ 35-50-2-3 to -3-4 (Supp. 1979). All persons sentenced to indeterminate sentences under the pre-Penal Code law are eligible for release on parole after serving the minimum term. *Id.* § 11-1-1-9.1 (Supp. 1978) (amended 1979). Persons sentenced under pre-Penal Code law to determinate sentences are eligible for parole upon serving half of the determinate term or 20 years, whichever occurs first. *Id.* This left only the persons serving life sentences without automatic eligibility for parole consideration. The statute passed in 1979 remedied the situation by allowing parole consideration for any person serving a life sentence after 20 years of imprisonment if the sentence was for murder, or after 15 years of imprisonment if the sentence was for any other crime. This provision does not apply to any person serving more than one life sentence. *Id.* § 11-1-1-9.1 (Supp. 1979). While persons sentenced under the Penal Code are subject to parole supervision upon release, *id.* § 35-50-6-1(b), they are automatically released without consideration by a parole board or other similar authority upon serving the sentence less the credit time earned. *Id.* § 35-50-6-1(a).

¹⁸⁷Act of Apr. 9, 1979, Pub. L. No. 292, 1979 Ind. Acts 1485 (codified at IND. CODE §§ 35-4-6-1.5, -2.5 (Supp. 1979)); Act of Apr. 4, 1979, Pub. L. No. 293, 1979 Ind. Acts 1485 (codified at IND. CODE § 35-4.1-4-2 (Supp. 1979)). Indiana decisions have consistently held that there is no constitutional right to bail for a person convicted of an offense. *Iles v. Ellis*, 264 F. Supp. 185 (S.D. Ind. 1967); *Scruggs v. State*, 161 Ind. App. 672, 680, 317 N.E.2d 800, 806 (1974); *In re Pisello*, 155 Ind. App. 484, 490, 293 N.E.2d 228, 230 (1973) (citing *United States v. Motlow*, 10 F.2d 657 (7th Cir. 1926)); *Ex parte Pettiford*, 97 Ind. App. 703, 703, 167 N.E. 154, 154 (1929). *See generally* Annot., 45 A.L.R. 458 (1926). The legislature has the authority to limit trial court discretion in setting appeal bonds: "Since bail pending appeal is a right only if granted by the legislature, . . . the denial of bail . . . pending appeal is a denial of constitutional rights only if it is the result of an unreasonable classification constituting an invidious discrimination under the Fourteenth Amendment to the United States Constitution." *In re Pisello*, 155 Ind. App. at 490, 293 N.E.2d at 231. Pub. L. No. 292 allows trial courts to set appeal bonds at their discretion except when the conviction was for a Class A felony or for a non-suspendible offense under IND. CODE § 35-50-2-2 (Supp. 1979). Prior law, *id.* § 35-4-6-1 (1976) (repealed 1979), prohibited appeal bonds only for those sentenced to die or to serve life terms and to persons under 18 whose commitment was to a penal institution other than the Indiana Reformatory at Pendleton. The new statute specifically applies to persons convicted but not yet sentenced and to those sentenced persons who have

appealed or plan to appeal their convictions. Pub. L. No. 293 refers only to the period between conviction and sentencing; it requires the imprisonment, pending sentencing, of persons who were not jailed before trial if the conviction was for a "felony against the person under IC 35-42 which is also specified under IC 35-50-2-2." Act of Apr. 4, 1979, Pub. L. No. 293, 1979 Ind. Acts 1485 (codified at IND. CODE § 35-4.1-4-2 (Supp. 1979)). At first glance, this second statute is unnecessary because Pub. L. No. 292 bars release on appeal bond of all persons convicted of nonsuspendible offenses, while Pub. L. No. 293 covers only some nonsuspendible crimes. What Pub. L. No. 293 adds to the other law is a requirement of imprisonment of convicted persons who could remain out of jail until the date of sentencing, without having received appeal bonds. These would be persons who had no bond set for them before trial and persons whose pre-trial bond might, in the absence of this statute, be considered by the court as continuing in effect until sentencing. Because nothing denominated "appeal bond" would have been issued for these convicted defendants, the restrictions on appeal bonds in Pub. L. No. 292 would be inapplicable to these persons.

VIII. Domestic Relations

Helen Garfield*

A. Adoption

Ever since the United States Supreme Court announced, in *Stanley v. Illinois*,¹ that an unwed father has a due process right to a hearing on his fitness as custodian of his children,² courts and legislatures have been concerned with the rights of the fathers of illegitimate children.³ Defining these rights presents a complex problem because there may be irreconcilable conflicts between the rights of the father and the rights and interests of the children. During the survey period, the Indiana Court of Appeals decided two cases dealing with the right of the father of an illegitimate child to consent to the adoption of his child.⁴

In *In re Adoption of Infant Male*,⁵ the child had been conceived after the mother and the putative father were divorced, but during a period when they had resumed cohabitation. At that time, the ex-husband neither acknowledged paternity⁶ nor offered to pay medical expenses. After adoption proceedings had been instituted, however, he asserted a claim of paternity and asked for custody. On these facts, the trial court found that the child's father was "unknown" and granted the petition for adoption.⁷ The court of appeals affirmed, holding that the evidence supported the trial court's negative finding on the paternity issue.⁸

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¹405 U.S. 645 (1972).

²The father in *Stanley* had been deprived of the children's custody without a hearing after the death of their mother as a result of a statutory presumption that unwed fathers were unfit parents. The Supreme Court concluded that Stanley had a due process right to a hearing on his fitness as a parent and that the Illinois statute denying a hearing to unmarried fathers, while granting one to other parents, violated the equal protection clause of the fourteenth amendment, U.S. CONST. amend. XIV, § 1. *Id.* at 657-58.

³The Supreme Court recently has decided two cases dealing with the unwed father's rights in connection with adoption of his children. *Caban v. Mohammed*, 99 S. Ct. 1760 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

⁴Unwed Father v. Unwed Mother, 379 N.E.2d 467 (Ind. Ct. App. 1978); *In re Adoption of Infant Male*, 378 N.E.2d 885 (Ind. Ct. App. 1978).

⁵378 N.E.2d 885 (Ind. Ct. App. 1978).

⁶The mother did file a paternity suit against him, which was ultimately dismissed for lack of prosecution. *Id.* at 887.

⁷*Id.*

⁸*Id.* at 888. There was no presumption of legitimacy because the child was conceived after the parents' divorce. The burden was therefore on the father to prove paternity. *Id.* at 886-87.

The holding of *Infant Male* is not remarkable, but the court's discussion of *Quilloin v. Walcott*⁹ has disturbing implications for future cases. The *Infant Male* court said that "had paternity been established," the putative father "would likely have acquired a veto authority" over the adoption under *Quilloin*.¹⁰ The court construed *Quilloin* as implying that such a veto could be acquired during the adoption proceedings themselves, even though there had been no *prior* adjudication of paternity.¹¹ This suggests that, if the putative father had been able to prove paternity in *Infant Male*, he would have been constitutionally entitled to prevent the child's adoption, regardless of the interests of the child or the wishes of the mother. If this is an accurate reading of *Quilloin*, then in any future case in which the evidence of paternity is uncontroverted, a belated claim of paternity by a previously disinterested natural father would be sufficient to give him a constitutional right to veto the child's adoption. Fortunately, *Quilloin* does not support this interpretation.

Although *Quilloin* did discuss the natural father's ability to acquire "veto authority" over the adoption of his child, the Supreme Court was describing what Georgia law provided and not what the Constitution required:

Generally speaking, *under Georgia law* a child born in wedlock cannot be adopted without the consent of each living parent In contrast, only the consent of the mother is required for adoption of an illegitimate child. [GA. CODE § 74-403(3) (1975)] *To acquire the same veto authority possessed by other parents*, the father of a child born out of wedlock must legitimate his offspring, either by marrying the mother and acknowledging the child as his own, § 74-101, or by obtaining a court order declaring the child illegitimate and capable of inheriting from the father, §74-103.¹²

The father in *Quilloin* had filed his petition for legitimation at the same time as he filed his objections to the proposed adoption of the child by his stepfather. *Under Georgia law*, the effect of granting the petition for legitimation would have been to give the father an absolute veto over the adoption. The trial court, however, denied the petition, and the Supreme Court of Georgia affirmed.¹³

The only issue on appeal to the United States Supreme Court was whether the father, whose status as such was not in dispute,

⁹434 U.S. 246 (1978).

¹⁰378 N.E.2d at 888.

¹¹*Id.*

¹²434 U.S. at 248-49 (emphasis added).

¹³*Id.* at 251-52. Like the petitioner in *Infant Male*, the father in *Quilloin* was granted a hearing. Therefore, the *Stanley* due process issue did not arise.

was denied due process or equal protection when the Georgia courts refused to allow him to veto the adoption, without first finding that he was an unfit parent.¹⁴ The constitutionality of the state procedures involved was not before the Court. Nothing in *Quilloin* can be read as holding that a state is constitutionally *required* to accept a petition for legitimation (or paternity),¹⁵ which is filed in conjunction with an objection to adoption. In fact, there are clear implications to the contrary. While the Court did not accept the stepfather's argument that the father had forfeited his rights by "his failure to petition for legitimation during the 11 years prior to filing of . . . [the] adoption petition,"¹⁶ the Court placed considerable emphasis on the fact that the father had "never exercised actual or legal custody over his child, and thus [had] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."¹⁷ *Quilloin* thus implies that an unwed father cannot claim constitutional protection for his parental rights *unless* he actually has assumed parental responsibilities.¹⁸ A subsequent Supreme Court opinion makes this implication explicit: "In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."¹⁹

If an unwed father can claim a veto power over his child's adoption in Indiana, the power is not derived from the United States Constitution, but from the Indiana adoption statutes. Section 6 of the adoption statutes gives the father of an illegitimate child a veto power over its adoption by requiring his consent to the adoption whenever a court proceeding has established his paternity.²⁰ Unlike the

¹⁴434 U.S. at 253. The Supreme Court held that *Quilloin*'s constitutional rights had not been violated. *Id.* at 256.

¹⁵There are important differences between the petition for legitimation authorized by Georgia law and the paternity claim involved in *Infant Male* which are discussed in the text accompanying notes 20-21 *infra*.

¹⁶434 U.S. at 254.

¹⁷*Id.* at 256.

¹⁸The same implication was discernible in *Stanley v. Illinois*, 405 U.S. 645 (1972), because Stanley had actual custody of his children after their mother's death and had had close contact with them over an 18-year period.

¹⁹*Caban v. Mohammed*, 99 S. Ct. 1760, 1768 (1979). The Court held in *Caban* that the equal protection rights of a natural father, who had participated in the rearing of his children, were violated when a New York court allowed the children to be adopted by their stepfather over the natural father's objections.

²⁰IND. CODE § 31-3-1-6(a)(2) (Supp. 1979) provides:

(a) Except as otherwise provided in this section, a petition to adopt a child under eighteen (18) years of age may be granted only if written consent to adoption has been executed by:

. . . .

(2) the mother of a child born out of wedlock and the father of such a

Georgia legitimation proceeding discussed in *Quilloin*, a paternity proceeding is often involuntary;²¹ therefore, a finding of paternity does not necessarily indicate that the father has any real interest in the child.²² The Indiana statute provides an escape hatch, however. The statute gives the adoption court power to override the father's veto, if the court finds that his consent is being unreasonably withheld.²³ The trial court in *Quilloin* allowed the stepfather to adopt the child under Georgia law by simply denying the father's belated petition for legitimation. If a similar case arose in Indiana, the court would have difficulty dismissing a paternity petition in a case in which the evidence of paternity was uncontested, as it was in *Quilloin*. The court would have to make a finding of paternity, which automatically would give the father a veto power over the adoption.²⁴ If the court felt that an adoption would be in the child's best interest, the court would have to find that the father's consent was being unreasonably withheld.²⁵ In any case in which the father had never assumed any responsibility for the child beyond the financial responsibility compelled by the paternity order, a court could find that the father's consent was unreasonably withheld without violating either the Indiana statute or the holding of *Quilloin*.

*Unwed Father v. Unwed Mother*²⁶ involved a human problem which was virtually impossible to resolve satisfactorily by the time of appeal. For two years after the child's birth, the mother had successfully blocked the father's attempts to obtain custody of his child. She even had prevented him from discovering the child's whereabouts; she had revealed only that the child was living in an adoptive home somewhere outside the state. By the time the case came to the court of appeals, there was little chance that the father's interests could be recognized without seriously jeopardizing the child's emotional stability. As the court observed, after the child had experienced the stability of a two-parent home for two years, "the prospect of uprooting the child appears to be undesirable."²⁷

child whose paternity has been established by a court proceeding
(emphasis added). See also *id.* § 31-3-1-6(g)(2).

²¹*Id.* §§ 31-6-6.1-1 to -19. Under the new paternity statute, actions can be brought by the mother, the putative father, or the child. See note 261 *infra* and accompanying text.

²²A finding of paternity in an involuntary proceeding is less relevant to the father's right to veto his child's adoption than is the voluntary legitimation proceeding involved in *Quilloin*.

²³IND. CODE § 31-3-1-6(g)(6) (Supp. 1979).

²⁴*Id.* § 31-3-1-6(a)(2) (Supp. 1978), quoted in note 20 *supra*.

²⁵*Id.* § 31-3-1-6(g)(6).

²⁶379 N.E.2d 467 (Ind. Ct. App. 1978).

²⁷*Id.* at 472.

One can only hope that *Unwed Father* will provide useful guidelines which will prevent such injustice in future cases.

The child had been conceived while his parents were students in Minnesota. The parents did not wish to marry; nor did they wish the pregnancy to be terminated by abortion, although the mother did consider this alternative after the father indicated his desire to have custody.²⁸ The mother insisted that the child be placed for adoption and that the adoptive parents remain anonymous. Ultimately, her wishes prevailed. The child was born and placed for adoption at a location known only to the mother. Even in the habeas corpus action brought by the father, she refused to divulge the child's whereabouts, and the trial court did nothing to aid the father's discovery efforts. After the final hearing, the court held that the father was estopped from asserting his parental rights because he had promised the mother at one point during the pregnancy that he would consent to adoption.²⁹ The court found that the mother had relied on his promise in failing to go through with the planned abortion and that the pregnancy was too far advanced for her to have an abortion by the time he told her that he would not consent to the adoption. The trial court therefore denied the father's petition for a writ of habeas corpus and awarded the mother "damages" of \$3,000.³⁰

The court of appeals reversed, holding that the trial court had erred in finding an estoppel against the father and in refusing to order the mother to answer the father's interrogatories concerning the whereabouts of the child.³¹ An oral promise to consent to adoption of a child is not an enforceable promise under Indiana law;³² therefore, it could not form the basis for an estoppel.

The right of the father of an illegitimate child to a court determination of his claim to custody of his child is now firmly established.³³ The trial court should have made the determination here, instead of

²⁸The father even provided money for an abortion, but the mother failed to go through with it. *Id.* at 468. He also promised to pay all expenses connected with the birth. *Id.*

²⁹The father's version was that he had promised to consent because he "wanted to ease Mother's anguish." He said he planned to adopt the child himself without telling her. *Id.* at 469.

³⁰*Id.* at 470. The legal theory underlying the award of damages was not explained in the trial court's order.

³¹*Id.* at 470-71. The court of appeals stated further that the court should have imposed sanctions upon the mother when she failed to comply with his discovery order under IND. R. TR. P. 37(B). *Id.* at 471.

³²Under Indiana law, the consent must be in writing and must be given *after* the birth of the child. IND. CODE § 31-3-1-6(a), (b) (Supp. 1979).

³³*E.g.*, *Caban v. Mohammed*, 99 S. Ct. 1760 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Hyatte v. Lopez*, 366 N.E.2d 676 (Ind. Ct. App. 1977).

allowing the mother, in effect, to usurp the court's function by deciding the custody issue unilaterally. Because of the time required to perfect an appeal, her decision may well have become irreversible. Even though she lost the appeal, she probably succeeded in depriving the unwed father of his constitutional right to a hearing on his fitness as a parent.³⁴ Although the father prevailed in the court of appeals, it is unlikely that he could now succeed in gaining custody. On remand, the trial court must consider the child's interests, and it is hardly likely that the best interests of the child would be served by removing it from a stable home environment and delivering it into the custody of a stranger.

B. Child Custody

1. *Jurisdiction.*—In *Campbell v. Campbell*,³⁵ the Indiana Court of Appeals reversed and remanded a custody modification decision, without considering the merits, because the trial court had failed to question its own jurisdiction over the custody issue.³⁶ Neither party had raised the issue of jurisdiction, but the court of appeals indicated that the trial court should have raised the issue sua sponte. The Uniform Child Custody Jurisdiction Law³⁷ was interpreted as imposing an affirmative duty upon the trial court to determine, as a threshold issue in every case, whether the jurisdictional standards of the statute had been met.³⁸ Reversal in this case was necessary “in order to further the laudable objectives of the Act and to bring to the attention of the practicing bar the necessity, in jurisdictional and practical terms, of complying with and implementing the provisions of the Act.”³⁹

Campbell is a particularly appropriate case for the appellate court to use for this purpose because its facts indicate that it is at least questionable whether the jurisdictional requirements of the statute were met. The original Indiana divorce decree had awarded custody of the three children to the mother. Proceedings to modify the custody provisions were commenced by the father shortly after the mother and children had moved to Texas. Thereafter, the father moved to Florida. Nevertheless, the proceedings continued in Indiana, culminating in an order awarding two of the children to the

³⁴The doctrine of estoppel invoked by the trial court is inapplicable in light of *Stanley*, which held that an unwed father has a due process right to a hearing on his fitness for custody. Only a knowing waiver can justify depriving him of the hearing to which he is constitutionally entitled. Cf. *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972).

³⁵388 N.E.2d 607 (Ind. Ct. App. 1979).

³⁶*Id.* at 608.

³⁷IND. CODE §§ 31-1-11.6-1 to -24 (Supp. 1979).

³⁸388 N.E.2d at 610.

³⁹*Id.* at 608.

father and one to the mother. Although a divorce court normally has continuing jurisdiction over the issues of custody and support because both are subject to future modification should circumstances change,⁴⁰ *Campbell* holds in effect that the trial court's jurisdiction over custody continues only as long as the court continues to meet the jurisdictional standards of the Uniform Child Custody Jurisdiction Law.⁴¹ Once conditions have so changed that the statutory standards are no longer met, the Indiana court loses subject matter jurisdiction over the issue of custody.

To this point, the court's reasoning is fully supported by the statute. Section 3, the jurisdictional provision, states: "*A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if . . .*"⁴² The clear import of this language is that an Indiana court has subject matter jurisdiction over custody *only if* the conditions listed in section 3 are met. The court of appeals is not on solid ground, however, with respect to what it describes as the statute's "second jurisdictional hurdle."⁴³ Section 7 contains the unique forum non conveniens provisions of the statute, designed to facilitate the resolution of conflicts between two or more states, each of which can meet the somewhat flexible jurisdictional requirements of section 3. Section 7 provides in pertinent part:

*A court which has jurisdiction under this chapter to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.*⁴⁴

The court of appeals observed that this section was "intended to vest only one state with jurisdiction at any given time."⁴⁵ This statement is true in spirit, but use of the word "vest" is unfortunate. Viewed as a whole, the court's discussion treats section 7 as a "jurisdictional hurdle"⁴⁶ which must be overcome *before* subject matter jurisdiction can "vest."⁴⁷ This language implies that section 7 is a

⁴⁰See IND. CODE §§ 31-1-11.5-17, -22(d) (1976 & Supp. 1979).

⁴¹*Id.* § 31-1-11.6-3(a) (Supp. 1979).

⁴²*Id.* (emphasis added).

⁴³388 N.E.2d at 609.

⁴⁴IND. CODE § 31-1-11.6-7(a) (Supp. 1979) (emphasis added). The section also lists in some detail the factors to be considered and the procedures to be used in making the determination to decline jurisdiction.

⁴⁵388 N.E.2d at 610 (emphasis added).

⁴⁶*Id.* at 609.

⁴⁷*Id.* at 610.

prerequisite to subject matter jurisdiction under the statute. The commissioners' notes, quoted by the court, describe the purpose of section 7 as being "to encourage *judicial restraint in exercising jurisdiction* whenever another state appears to be in a better position to determine the custody of a child."⁴⁸ This is consistent with the language of section 7, which states that a court which *already has* jurisdiction may decline to exercise that jurisdiction when another state can provide a more appropriate forum. The language used throughout section 7 is the permissive "may" rather than the mandatory "shall." Once a court determines that it is an inconvenient forum,⁴⁹ it "*may* dismiss the proceedings, or it *may* stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper."⁵⁰ Thus, even after the court determines that it is an inconvenient forum under section 7, the court is not automatically divested of the jurisdiction which has already vested under section 3. The court can, in its discretion, retain jurisdiction unless and until a court in another state assumes jurisdiction over the custody dispute.⁵¹ Nothing in section 7 supports the interpretation that it constitutes a condition precedent to custody jurisdiction.

Properly construed, section 7 requires custody courts to inquire into the forum non conveniens issue, regardless of whether the par-

⁴⁸*Id.* n.4 (emphasis added) (quoting UNIFORM CHILD CUSTODY JURISDICTION ACT § 7, Commissioners' Notes. The commissioners' notes state that § 7 "serves as a second check on jurisdiction once the test of [§§] 3 or 14 [modification of a decree of another state] have [*sic*] been met." *Id.* The court apparently concluded that the commissioners' "second check" on jurisdiction was equivalent to a "second jurisdictional hurdle" or a prerequisite to jurisdiction. *Id.* at 609. The commissioners' notes make it clear, however, that § 7 comes into play only *after* jurisdiction attaches under § 3.

⁴⁹The factors to be considered in making the determination are set out in IND. CODE § 31-1-11.6-7(c) (Supp. 1979):

- (1) [I]f another state is or recently was the child's home state;
- (2) if another state has a closer connection with the child and his family or with the child and one (1) or more of the contestants;
- (3) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
- (4) if the parties have agreed on another forum which is no less appropriate; and
- (5) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 1 of this chapter.

⁵⁰*Id.* § 31-1-11.6-7(e) (emphasis added).

⁵¹Before making a decision on the forum non conveniens issue, a court "may" communicate with a court in another state and exchange information with that court to aid in determining which can provide the better forum. *Id.* § 31-1-11.6-7(d). After the decision, the court "shall inform the court found to be the more appropriate forum of this fact." *Id.* § 31-1-11.6-7(h).

ties raise the issue. Such an interpretation is consistent with the statute's objective of avoiding "jurisdictional competition and conflict with courts of other states."⁵² The usual rule, that the forum non conveniens issue is considered waived unless it is raised by one of the parties, is not appropriate in custody cases because the parties to the action are not the only persons whose interests must be considered. The child's interests are also involved, and the court has a duty to protect them. The existence of this duty is sufficient justification for treating the forum non conveniens question differently in custody actions without treating it as a question of subject matter jurisdiction. Such jurisdiction is the very source of a court's power. Without it, no court is competent to proceed. Courts should always be wary of characterizing *any* issue as jurisdictional. In *Campbell*, section 3 is properly identified as a prerequisite to subject matter jurisdiction, and that fact alone provides a sufficient ground to support reversal of the trial court's custody order. Section 7 is not a prerequisite to subject matter jurisdiction and should not be so characterized.

In *Kelley v. Kelley*,⁵³ the father's attack on the trial court's jurisdiction was directed primarily toward its jurisdiction over his person. The wife had filed a dissolution action while the husband was in Germany with the parties' two sons. He was served in Germany by registered mail. The husband entered a special appearance in the action solely for the purpose of attacking the court's personal jurisdiction over him. However, when the husband and the sons returned to Indiana, he was personally served with a petition for temporary custody and support.⁵⁴ Thereafter, the parties filed an agreed entry allowing the husband to take their daughter to Germany; all three children were to be returned to the wife by July 8, 1977. The trial court approved the entry. The husband failed to return the children at the agreed time and did not attend the final hearing in the dissolution action, although he was represented by counsel at the hearing. The trial court awarded custody of all three children to the wife. The court of appeals affirmed, holding that the husband was estopped to deny the trial court's personal jurisdiction over him.⁵⁵ Having requested the court to exercise jurisdiction by submitting the agreed entry for its approval, he had voluntarily submitted himself to the court's jurisdiction. The wife's residence

⁵²*Id.* § 31-1-11.6-1(a)(1).

⁵³387 N.E.2d 452 (Ind. Ct. App. 1979).

⁵⁴The petition also requested an order restraining him from removing the parties' daughter from the state until temporary custody was determined. *Id.* at 453.

⁵⁵*Id.* at 453-54. Personal jurisdiction over both parties is required for adjudication of custody and other "incidents" of marriage. *Id.* at 454. See *May v. Anderson*, 345 U.S. 528 (1953); *In re Marriage of Rinderknecht*, 367 N.E.2d 1128 (Ind. Ct. App. 1977).

within the jurisdiction was held to satisfy the statutory requirements for in rem jurisdiction over the dissolution of the marriage.⁵⁶

2. *Parental Rights*.—Upon the death of the custodial parent, the other parent becomes entitled to custody. In *In re Guardianship of Phillips*,⁵⁷ the mother had been awarded custody of the children. After her death, the maternal grandmother and the brother of the deceased mother asked to be appointed as co-guardians of the children. The mother's will, executed prior to her divorce from the children's father, had requested that her parents be named as guardians in the event of her death. The trial court nevertheless awarded custody to the father. The court of appeals affirmed, holding that in Indiana custody "immediately and automatically" reverts to the surviving parent upon the death of the parent with custody.⁵⁸ The "automatic" reversion is not necessarily permanent, however. The presumption favoring the natural parent can be overcome by showing that the parent is unfit or that the parent has, by long acquiescence or voluntary relinquishment, consented to custody in another.⁵⁹ No such showing was made in *Phillips*.⁶⁰

In *In re Marriage of Myers*,⁶¹ the court of appeals reversed an award of custody on the ground that the trial court improperly applied a presumption favoring the mother.⁶² The Indiana Dissolution of Marriage Act provides that, in determining custody, "there shall

⁵⁶387 N.E.2d at 454. In *Kelley*, the court of appeals tested the court's jurisdiction only under the Indiana Dissolution of Marriage Act, IND. CODE § 31-1-11.5-6 (Supp. 1977) (amended 1979); *id.* § 31-1-11.5-20 (1976) (amended 1979). 387 N.E.2d at 454-55. The court did not discuss jurisdiction over the custody issue under the Uniform Child Custody Jurisdiction Law. *Id.* §§ 31-1-11.6-1 to -24 (Supp. 1979). Although jurisdiction over custody traditionally has been regarded as incidental to jurisdiction over the dissolution of marriage, adoption of the uniform law indicated an intent to make it "the exclusive source of authority to adjudicate a custody dispute." *Campbell v. Campbell*, 388 N.E.2d 607, 608 (Ind. Ct. App. 1979) (decided April 26, 1979, about a month after *Kelley*). *Campbell* implies that *all* assertions of jurisdiction over custody, including those which are incidental to jurisdiction over dissolution, should be evaluated under the standards set forth in the uniform law.

⁵⁷383 N.E.2d 1056 (Ind. Ct. App. 1978).

⁵⁸*Id.* at 1059 (citing *State ex rel. Gregory v. Superior Court*, 242 Ind. 42, 176 N.E.2d 126 (1961); *Bryan v. Lyon*, 104 Ind. 227, 3 N.E. 880 (1885)).

⁵⁹383 N.E.2d at 1059; *Hendrickson v. Binkley*, 161 Ind. App. 388, 393-94, 316 N.E.2d 376, 380 (1974); see *Garfield, Domestic Relations, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 157, 162-63 (1979).

⁶⁰383 N.E.2d at 1059. The court of appeals held that the petition in *Phillips* could not have succeeded in any case because IND. CODE § 29-1-18-21(a) (1976) prohibits appointment of more than one guardian of the person unless the co-guardians are husband and wife.

⁶¹387 N.E.2d 1360 (Ind. Ct. App. 1979).

⁶²*Id.* at 1364.

be no presumption favoring either parent.”⁶³ This means that when either parent would be competent to care for the child, the judge must award custody by “looking only to the best interest of the child” without favoring either parent.⁶⁴ Under the facts of *Myers*, the only way the trial court could have decided to award custody to the mother was by indulging in the forbidden presumption favoring her custody. The court of appeals held that this was an abuse of discretion.⁶⁵ The father had custody of the child for three years prior to entry of the decree dissolving the marriage and awarding custody to the mother. Nobody questioned the father’s ability to care for the child. The mother, on the other hand, had a history of mental illness and had three times attempted suicide.⁶⁶ The trial judge had indicated that he had “some concern” about the mother’s ability to take care of the child.⁶⁷

The facts of *Myers* offer considerable support for the appellate court’s decision. The court also relied upon remarks made by the judge during informal conferences, as reported in an affidavit filed by the husband’s attorney in support of his motion to correct errors. Judge Hoffman, in dissent, questioned the wisdom of basing a decision upon off-the-record remarks.⁶⁸ Judge Hoffman stated that such a practice could “only encourage a multitude of appeals based on events occurring outside the courtroom, thereby discouraging open communication between the bench and bar.”⁶⁹

In a somewhat similar fact situation, the court of appeals affirmed a judgment awarding custody of three children to the mother. In *Lovko v. Lovko*,⁷⁰ however, the issue on appeal was whether the trial court had properly used the “best interests of the child” standard in making a custody termination *after* the dissolution decree had been entered.⁷¹ Normally, a custody order entered after the original decree would be a modification of a prior order, which can

⁶³IND. CODE § 31-1-11.5-21(a) (1976) provides in part: “The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there shall be no presumption favoring either parent.”

⁶⁴387 N.E.2d at 1363.

⁶⁵*Id.* at 1364.

⁶⁶Two psychiatrists testified at the hearing. The only one of the two who had treated the wife stated that he could not rule out the possibility that future stresses related to full time care of the child might trigger a psychotic episode. *Id.*

⁶⁷*Id.* at 1363.

⁶⁸*Id.* at 1365-66 (Hoffman, J., dissenting).

⁶⁹*Id.* at 1366 (Hoffman, J., dissenting). Judge Hoffman did not believe the facts of the case in themselves warranted reversal. *Id.* at 1365.

⁷⁰384 N.E.2d 166 (Ind. Ct. App. 1978).

⁷¹*Id.* at 171, 175.

be made only upon a showing of "changed circumstances so substantial and continuing as to make the existing custody order unreasonable."⁷² But in *Lovko*, the dissolution decree specifically awarded the husband "temporary" custody of the children "until the end of the next school year."⁷³ The later order was therefore the trial court's first opportunity to make a permanent award of custody. The order was properly treated as an initial custody determination rather than as a modification. The "best interests of the children" standard was therefore appropriate.⁷⁴

In affirming the award of custody to the mother, the court of appeals expressly reserved approval of the unusual procedure followed in *Lovko*.⁷⁵ The original order granting temporary custody to the father was based upon an agreement of the parties, which apparently had been made because the wife was having problems with alcoholism. At the later custody hearing, there was evidence that the mother had overcome these problems.

3. *Visitation Rights*.—In *Hegedus v. Hegedus*,⁷⁶ the court of appeals decided that a mother could not be held in contempt for refusing to allow visitation by the child's father in the absence of a court order specifically granting him visitation rights.⁷⁷ Hegedus originally

⁷²IND. CODE § 31-1-11.5-22(d) (1976).

⁷³384 N.E.2d at 168-69.

⁷⁴*Id.* at 171. In discussing the standards, the court of appeals stated that under the Uniform Marriage and Divorce Act, the same standard would be used in a modification as in the original determination, i.e., the "best interests of the child." *Id.* This is a misreading of the Act provision. Although the words "best interest of the child" are used in the Uniform Act, the overall intent of its modification provision is clearly to require a substantial change of circumstances before an existing custody order can be modified. UNIFORM MARRIAGE AND DIVORCE ACT § 409(b) provides in part:

[T]he court shall not modify a prior custody decree unless it finds . . . that a change has occurred in the circumstances of the child or his custodian, and that modification is necessary to serve the best interest of the child. In applying these standards the court shall retain the custodian appointed pursuant to the prior decree unless:

- (1) the custodian agrees to the modification;
- (2) the child has been integrated into the family of the petitioner with consent of the custodian; or
- (3) the child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him.

Id. (emphasis added). As limited by the other provisions of this section, the Uniform Act's "best interests" standard of modification may be even more stringent than the Indiana standard. See *id.*, Commissioners' Note.

⁷⁵384 N.E.2d at 172. Because no appeal had been taken from the original decree awarding temporary custody to the father, the propriety of that procedure was not before the court. *Id.*

⁷⁶383 N.E.2d 446 (Ind. Ct. App. 1978).

⁷⁷*Id.* at 448.

filed an action for dissolution but later amended his complaint to ask for a declaration of invalidity. The trial court's order declared the purported marriage "void from its inception" because "the defendant was in fact lawfully married to another person" at the time.⁷⁸ The order declared that a child had been born "during the time [the] plaintiff and defendant were living and cohabitating together," but it did not purport to determine custody or visitation rights.⁷⁹ Because there was no court order for the mother to violate, she could not be held in contempt. The trial court therefore had properly dismissed the father's petition for rule to show cause.⁸⁰

4. *Child Snatching.*—The problem of child snatching has commanded national attention in recent years. The Uniform Child Custody Jurisdiction Law was adopted in Indiana in 1977 to discourage child snatching by parents.⁸¹ The statute is particularly effective in cases in which a child is removed from the state in open defiance of an existing custody order by a parent who hopes to secure a legal change of custody in the courts of another state. This effectiveness should increase as more states adopt it.⁸² The uniform law cannot reach the covert child snatcher, however. The parent who steals his child away from its custodial home and conceals the child can be reached only by the criminal law. The Indiana legislature has amended the criminal code to make child snatching a crime, whether committed by a parent or by someone else.⁸³

The definition of "criminal confinement" has been expanded to include removing a "person, who is under eighteen (18) years of age, to a place outside Indiana when the removal violates a child custody order of a court."⁸⁴ Child snatching is a Class D felony if committed by a parent but a Class C felony if committed by a person other

⁷⁸*Id.* at 447-48.

⁷⁹*Id.* at 448. The order also failed to address the issue of the child's legitimacy. Under an 1873 Indiana statute, the issue of a bigamous marriage is legitimate only if "either of the parties . . . shall have contracted such void marriage in the reasonable belief that such disability did not exist" and then only if the issue was "begotten before the discovery of such disability by such innocent party" IND. CODE § 31-1-7-3 (1976). This seems to be a rather extreme example of the sins of the fathers (or, here, the mothers) being visited upon the children.

⁸⁰383 N.E.2d at 448.

⁸¹Pub. L. No. 305, 1977 Ind. Acts 1383 (codified at IND. CODE §§ 33-1-11.6-1 to -24 (Supp. 1979)). The act is discussed at notes 35-52 *supra* and accompanying text.

⁸²The Uniform Act had been adopted by 37 states, as of August 7, 1979. [1979] 5 FAM. L. REP. (BNA) 1151. For a general discussion of its effectiveness, see Bodenheimer, *Progress under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modification*, 65 CALIF. L. REV. 978 (1977).

⁸³Act of April 22, 1977, Pub. L. No. 299, § 1, 1977 Ind. Acts 1383 (codified at IND. CODE § 35-42-3-3 (Supp. 1979)).

⁸⁴IND. CODE § 35-42-3-3(a)(3) (Supp. 1979).

than a parent.⁸⁵ The statute further provides that "it may be considered as a mitigating circumstance if the accused person returned the other person to the custodial parent within seven (7) days of the removal."⁸⁶

Definition of the crime in terms of "removal" from the state may limit its application in cases in which the parent takes the child out of state for visitation in compliance with a custody order and keeps it beyond the permitted time. If such a parent attempts to retain the child permanently and conceal its whereabouts from the custodial parent, his conduct would seem to be as reprehensible as that of the parent whose initial removal of the child from the state was in violation of a custody order. The effect on the child can be equally devastating in either case.⁸⁷ The Indiana legislature's narrow definition of the crime may be a manifestation of the reluctance of legislatures generally to subject child snatching parents to criminal penalties.⁸⁸ Some have argued that such a parent should not be treated as a criminal because he (or she) acts out of love for the child.⁸⁹ Even so, subjecting a child to the trauma of abduction and concealment merely to gratify the parent's own desire for custody is a strange kind of love. A parent may seek to rationalize child snatching by focusing on the deficiencies of the custodial parent; however, it is difficult to imagine a case in which the present custodial arrangement would be more detrimental to the child than abduction. If such a case were to exist, the best interests of the child would be better served by seeking a remedy through the courts than by child snatching. Criminalizing such irresponsible conduct by parents may

⁸⁵*Id.* § 35-4-3-3(a). Criminal confinement is a Class B felony if committed by a person armed with a deadly weapon or if it results in "serious bodily injury to another person." *Id.* Presumably this would apply even if the crime were committed by a parent.

⁸⁶*Id.* § 35-42-3-3(b).

⁸⁷The potential for trauma to the child may be somewhat greater when the child's removal from the state is in violation of a court order, especially when the actual abduction of the child is carried out by a person other than the parent. This potential arises, however, from the manner in which the child is taken from the other parent's custody and not from the legality of its removal from the state, which is the focus of the statutory definition of the crime. From the child's point of view, the act of removal from the state can be equally innocuous whether or not it is committed in violation of a custody order, which is the crime as the statute defines it. In either case, unless the method of abduction is traumatic, the real harm to the child results from being retained and concealed by the snatching parent.

If the child is not removed from the state but rather is snatched and concealed in Indiana, no crime is committed by the snatching parent. The parent would, however, be subject to the custody court's contempt power for violation of the custody order.

⁸⁸See, e.g., Coombs, *The "Snatched" Child is Halfway Home in Congress*, 11 FAM. L.Q. 407 (1978) (discussing federal legislation).

⁸⁹*Id.* at 417.

have some effect as a deterrent. A more important result, however, is to make the criminal justice system available to assist in apprehending the snatching parent and returning the child to its home.

5. *Other Statutory Changes.*—An additional legislative change protects the rights of the non-custodial parent in cases in which the custodial parent wishes to change the child's name. Usually, this occurs when a mother having custody of the child has remarried and wants the child to adopt the stepfather's name. The amended statute now requires that the non-custodial parent consent to the name change.⁹⁰ If the parent fails to consent or files an objection to the name change, a hearing must be held.⁹¹ The court's decision is based on the "best interests of the child," but the statute establishes a presumption in favor of an objecting parent who has made support payments and has complied with the other terms of a custody decree.⁹²

C. Child Support

All of the child support cases decided during the survey period deal with some aspect of enforcement of support orders. Issues relating to modification of existing orders have arisen in the context of actions for enforcement by contempt or otherwise. These issues will be discussed under *modification*, regardless of the kind of enforcement proceedings involved. One case, which arose after the survey period, has made significant changes in Indiana law relating to enforcement of support orders and will therefore be discussed herein.⁹³

1. *Criminal Non-Support.*—In *Burris v. State*,⁹⁴ a father who had not contributed to the support of his three children since April 1970, was convicted of wilful nonsupport under the former Indiana statute.⁹⁵ The court of appeals reversed, holding that the State had failed to meet its burden of proving beyond a reasonable doubt that the defendant was able to support his children and that he had

⁹⁰IND. CODE § 34-4-6-2(b) (Supp. 1979). Consent is dispensed with in any case in which it would not be required for an adoption under *id.* § 31-3-1-6 (1976).

⁹¹*Id.* § 34-4-6-4(c) (Supp. 1979).

⁹²*Id.* § 34-4-6-4(d).

⁹³Kuhn v. Kuhn, 389 N.E.2d 319 (Ind. Ct. App. 1979). Another case, *Hexter v. Hexter*, 386 N.E.2d 1006 (Ind. Ct. App. 1979), is not discussed herein, although it deals with enforcement of an order for support. For a discussion of *Hexter*, see Townsend, *Secured Transactions and Creditors' Rights, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 369, 391 (1980).

⁹⁴382 N.E.2d 963 (Ind. Ct. App. 1978).

⁹⁵IND. CODE § 35-14-5-2 (1976) (repealed 1977) (current version at *Id.* § 35-46-1-5 (Supp. 1978)).

wilfully neglected to do so.⁹⁶ The defendant had been living in Arizona since the divorce in 1975. The State's only witness, his ex-wife, did not know whether he had been working or whether he was physically capable of working. The only evidence from which the trial judge could infer wilful nonsupport was testimony that the defendant had traveled to Indianapolis once after the divorce and that he had been married three times and divorced twice since leaving Indiana. The court of appeals held that this evidence was insufficient to support the conviction.⁹⁷ The problem of proof encountered in *Burris* should be relieved considerably under the new statute. The statute makes inability to support an affirmative defense, presumably shifting the burden of proof on this issue to the defendant.⁹⁸

2. *Modification.*—In Indiana, child support orders can be modified only as to future payments; they are not retroactively modifiable.⁹⁹ The ramifications of this rule were explored in three cases decided by the Indiana Court of Appeals during the survey period.¹⁰⁰

In *Haycraft v. Haycraft*,¹⁰¹ the parties had verbally agreed to increase the court-ordered child support from \$35 to \$40 per week, but the agreement was never submitted to any court for approval. The father paid \$40 per week from January 1974, to September 1976, when one of the two children began living with him. At that point, the father ceased making any payments. Two months later, the mother filed a petition seeking to have him held in contempt and requesting a judgment for arrears. The trial court found the father in contempt and ordered him to pay \$367.50 in arrears, calculated at \$17.50 per week (one-half of the support of \$35 per week due under the divorce decree). The court also modified its original decree, by awarding custody of the son to the father.¹⁰² The modified decree ordered the father to pay \$17.50 per week for the support of the

⁹⁶382 N.E.2d at 968.

⁹⁷*Id.* The State attempted to rely upon *Hudson v. State*, 370 N.E.2d 983 (Ind. Ct. App. 1977), in which the court held that an unemployed father who "deliberately [pursued] an irresponsible lifestyle" could be convicted of wilful nonsupport. *Id.* at 985. In *Hudson*, however, the wife testified both as to the defendant's state of health (capability of working) and his failure to seek employment. *Hudson* is discussed in Garfield, *supra* note 59, at 167-68.

⁹⁸*See* IND. CODE § 35-46-1-5(d) (Supp. 1978).

⁹⁹*Zirkle v. Zirkle*, 202 Ind. 129, 172 N.E. 192 (1930); *see Corbridge v. Corbridge*, 230 Ind. 201, 102 N.E.2d 764 (1952).

¹⁰⁰*Jahn v. Jahn*, 385 N.E.2d 488 (Ind. Ct. App. 1979); *In re Marriage of Honkomp*, 381 N.E.2d 881 (Ind. Ct. App. 1978); *Haycraft v. Haycraft*, 375 N.E.2d 252 (Ind. Ct. App. 1978).

¹⁰¹375 N.E.2d 252 (Ind. Ct. App. 1978).

¹⁰²*Id.* at 254.

daughter, who remained in the custody of her mother. The court of appeals affirmed,¹⁰³ but its opinion suggested that the trial court may have erred in calculating the judgment for arrears.¹⁰⁴

The father's appeal challenged the trial court's failure to credit him with the "overpayments" made from 1974 to 1976¹⁰⁵ under the parties' oral agreement. Because the agreement was ineffective as a modification of the court's original order, the father had paid \$5.00 more than he was legally obligated to pay for 139 weeks: a total of \$695. This sum exceeded the amount of the arrearage found to be due (\$367.50). The father therefore contended that the trial court had erred in finding him in contempt. The court of appeals held, however, that the trial court had correctly refused to treat the overpayments as a prepayment of future installments. The court reasoned that the purpose of a support order is to provide "regular, uninterrupted income" for the children's benefit.¹⁰⁶ To allow a parent to "build up a substantial credit" by prepayment and then to cease making payments for a lengthy period of time would defeat the purpose of requiring periodic payments.¹⁰⁷ The trial court was therefore correct in treating the excess payments as voluntary contributions to the children's support.

The court of appeals properly treated the parties' oral modification of the support order as ineffective to alter the support obligations imposed by the divorce decree. When the father failed to make the payments as agreed, the mother could not enforce the oral agreement; she was entitled only to the amount due under the original decree. The father was precluded from using the agreement to reduce or offset the amounts due under the decree. The lesson of *Haycraft* is that all modifications of support agreed to by the parties should be promptly submitted to the court for approval. No such agreement can modify an existing order until *after* the court has entered a formal order of modification.

Much can be learned from an additional issue *not* decided in *Haycraft*. The divorce decree apparently had ordered the father to pay \$35 per week for the support of the parties' "two minor children," who were in the custody of their mother,¹⁰⁸ without specifying the amount per child. After the contempt hearing, the order was modified to provide that the father would thereafter pay \$17.50 for the support of the daughter, who remained in the mother's

¹⁰³*Id.* at 256.

¹⁰⁴*Id.* at 254 n.3. The court of appeals did not consider the issue because the mother had failed to file a brief or allege cross errors. *Id.*

¹⁰⁵*Id.* at 255.

¹⁰⁶*Id.*

¹⁰⁷*Id.*

¹⁰⁸*Id.* at 253.

custody. The arrearages ordered, however, were for the period *before* the court's modification. Because the mother failed to preserve the issue for appeal, the court of appeals never resolved the question whether the trial court had correctly computed the arrearage at the rate of \$17.50 per week. The opinion suggests that this method of computing the arrearage may have amounted to a retroactive modification of the \$35 per week support order, which would be improper under Indiana law.¹⁰⁹ One would hope, however, that the Indiana courts will avoid such a mechanical application of the rule allowing only prospective modification of support orders. Generally, the rule operates benignly. It provides a measure of certainty to Indiana support decrees and assures that they will be recognized and enforced in other states. In the minority of states in which retroactive modification is permitted,¹¹⁰ the amount due under a support order is not certain until the arrearage has been reduced to judgment. Such support orders are not final and therefore are not entitled to full faith and credit in other states.¹¹¹ The Indiana modification rule does not have to be changed to avoid inequitable results in situations such as occurred in *Haycraft*, when the son's custody was transferred to the father. In any case in which custody is transferred to the parent obligated to pay support and the decree fails to break down the support payments into *X* dollars per child, the court should be able to apportion the payments ordered. It would be a simple exercise in mathematics. An Indiana court should then be able to hold, on appropriate evidence, that the support required by the order had been furnished in kind to the child, the real beneficiary of the support order.¹¹² Payment to the other spouse accordingly should be excused. Such difficulties could be avoided altogether if support orders were drafted more carefully. A support order should indicate the amount due for each child, the duration of the payments, and the conditions which would result in their termination, including a transfer of custody.

In *Jahn v. Jahn*,¹¹³ the father was ordered to pay \$50 per week for the support of his two children. The husband made all payments as due, except during weeks when the children were in his care.¹¹⁴

¹⁰⁹See *id.* at 254-55 n.3.

¹¹⁰See cases cited in Annot., 6 A.L.R.2d 1277 (1949).

¹¹¹*Sistare v. Sistare*, 218 U.S. 1 (1910). Retroactively modifiable orders *are* being recognized increasingly as a matter of comity. See *Worthley v. Worthley*, 44 Cal. 2d 465, 283 P.2d 19 (1955); *Kniffen v. Courtney*, 148 Ind. App. 358, 266 N.E.2d 72 (1971).

¹¹²In such a case, the custodial parent is not really requesting retroactive modification of the support order but rather is arguing that he has substantially complied with the order. See H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 15.3, at 514-16 (1968).

¹¹³385 N.E.2d 488 (Ind. Ct. App. 1979).

¹¹⁴The *Jahn* opinion does not indicate how long the periods were, stating merely that the father did not make payments "when the children were in his custody for

The mother brought a contempt action alleging arrearages totalling \$345.¹¹⁵ The trial court refused to hold the father in contempt, stating that he was not obligated to pay support "when the children were in his custody."¹¹⁶ The court of appeals reversed, holding that the trial court's action, in effect, permitted retroactive modification of the support order.¹¹⁷

The temporary visits of the children with their father in *Jahn* are substantially different from the permanent change in custody that occurred in *Haycraft*. In *Jahn*, the custody of the children remained always with the mother, although the children stayed with the father for a week or more on occasion. Presumably, the permanent expenses connected with custody (shelter, clothing, medical care, and so forth) also remained with the mother, although she undoubtedly saved something by not having to feed the children during these visits. If it had been contemplated that support payments would cease during such visits, then it seems reasonable to require that this be set out in the dissolution decree. In the absence of such a provision, support payments should continue to be paid, as the court of appeals stated, "in the manner, amount, and at the times required by the support order . . . until such order is modified or set aside."¹¹⁸

*In re Marriage of Honkomp*¹¹⁹ also involved an attempt by the non-custodial parent to obtain credit against his child support obligation, but in this case the payments for which credit was claimed had nothing to do with the child. In a contempt action brought by the mother, the trial court reduced the amount of support due under the support order to compensate the father for amounts garnished from his wages to pay a debt of the mother's. The court of appeals reversed, holding that this amounted to a retroactive modification of the support order.¹²⁰ The court pointed out that support payments are for the benefit of the children and are "received by the custodial parent in a fiduciary-like capacity."¹²¹ The nature of support payments

more than a weekend." *Id.* at 490. The amount of the arrears claimed (\$345) indicates, however, that the periods involved were relatively brief.

¹¹⁵The mother also asked for an increase in the support allowance and for a declaratory judgment that she was entitled to claim one child as an exemption on her federal income tax return, contrary to a provision of the decree of dissolution. Denial of both requests for modification of the decree was affirmed by the court of appeals. *Id.* at 492.

¹¹⁶*Id.* at 490. Because no actual transfer of custody occurred in *Jahn*, the court's use of the word "custody" in this context is inaccurate.

¹¹⁷*Id.* at 490-91.

¹¹⁸*Id.* at 490.

¹¹⁹381 N.E.2d 881 (Ind. Ct. App. 1978).

¹²⁰*Id.* at 882.

¹²¹*Id.*

would preclude any set off of amounts garnished to pay a marital debt against support payments. The court also held that evidence that the father was being subjected to continuing garnishment to pay the wife's debt was insufficient to establish the "substantial change of circumstances" necessary to justify a prospective modification of the support order.¹²² Although the evidence concerning the garnishments may have been sufficient to justify the trial court's refusal to hold the father in contempt, the garnishments could not excuse his liability for support due for the benefit of the child.¹²³

3. *Statute of Limitations.*—The Indiana Court of Appeals re-examined a number of earlier cases and overruled two of its own recent decisions in *Kuhn v. Kuhn*.¹²⁴ *Kuhn's* implications in relation to enforcement of child support orders extend far beyond the narrow statute of limitations issue actually decided.

In a previous decision in the same controversy,¹²⁵ the court of appeals had held that a child support order could not be enforced by contempt after the child had been emancipated.¹²⁶ The court stated further, however, that denial of the contempt citation was proper because the ex-wife had failed to obtain a second judgment establishing the amount of the arrearage.¹²⁷ This aspect of the earlier *Kuhn* decision was critically re-examined in the present case. After the first *Kuhn* decision, the ex-wife had sought a judgment fixing the amount of support in arrears. The trial court, however, held that her action was barred by the two-year statute of limitations for injuries to personal property, relying on another recent court of appeals decision, *Strawser v. Strawser*.¹²⁸ The court of appeals reversed,

¹²²*Id.* at 883.

¹²³*Id.* Inability to pay is generally recognized as a defense to a contempt citation, but not to the underlying obligation to pay support. See H. CLARK, *supra* note 112, § 15.3, at 510.

¹²⁴389 N.E.2d 319 (Ind. Ct. App. 1979). Although *Kuhn* was decided after the end of the survey period, it makes significant changes in prior law and therefore merits discussion here. The present *Kuhn* decision overruled *Strawser v. Strawser*, 364 N.E.2d 791 (Ind. Ct. App. 1977), and *Owens v. Owens*, 354 N.E.2d 350 (Ind. Ct. App. 1976), insofar as they were inconsistent with the court's new reasoning.

¹²⁵*Kuhn v. Kuhn*, 361 N.E.2d 919 (Ind. Ct. App. 1977), discussed in Garfield, *Domestic Relations, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 149, 175 (1978).

¹²⁶This holding was consistent with prior Indiana law, *Corbridge v. Corbridge*, 230 Ind. 201, 102 N.E.2d 764 (1952), and was not disturbed in the later *Kuhn* decision.

¹²⁷In this aspect of the case, the court relied on its own recent decision in *Owens v. Owens*, 354 N.E.2d 350 (Ind. Ct. App. 1976), which was overruled by the present *Kuhn* decision.

¹²⁸364 N.E.2d 791 (Ind. Ct. App. 1977), overruled, 389 N.E.2d at 320.

overruling *Strawser* and re-examining its reasoning in the first *Kuhn* decision.¹²⁹

Strawser is easily distinguishable from *Kuhn* because no court order of support had ever been issued in *Strawser*; the mother in *Strawser* was merely seeking reimbursement from the father for expenditures she had made for the children prior to their emancipation.¹³⁰ The mother in *Kuhn* was enforcing a court order requiring the father to make payments of \$35 per week for the support of his children, none of which had been paid prior to the children's emancipation in 1972. The court of appeals held in the second *Kuhn* decision that the statute of limitations applicable to such a case was the ten-year statute relating to judgments.¹³¹ The court also disapproved the reasoning of *Strawser*, which had resulted in the application of the two-year statute of limitations for injuries to personal property to an action for reimbursement of support.¹³²

In determining that the statute of limitations for judgments should apply in actions to enforce court-ordered support, the court had to deal with the contrary implications in *Owens v. Owens*.¹³³ The court had held in *Owens* that a second judgment for the amount in arrears was necessary before a support order could be enforced by execution.¹³⁴ In the first *Kuhn* opinion,¹³⁵ the court had followed *Owens* in stating that a second judgment was also necessary before a child support judgment could be enforced by contempt.¹³⁶ In the second *Kuhn* opinion, the court recognized that the requirement of a sec-

¹²⁹389 N.E.2d at 320, 322. The result of the earlier *Kuhn* decision was upheld, although the reasoning was questioned. *Id.* at 322, n.4.

¹³⁰*Strawser* is discussed in some detail in Garfield, *supra* note 59, at 168-69.

¹³¹389 N.E.2d at 322 (applying IND. CODE § 34-1-2-2 (1976)).

¹³²The court of appeals explained its action:

The *Strawser* court reasoned as follows: first, the right to sue on a debt is a chose in action; second, a chose in action is personalty; therefore, the statute of limitations is that for injury to personal property (and not for an action in debt). The defect in our reasoning is that while the first two propositions are correct statements of the law, the conclusion does not naturally follow because the statutes of limitation apply to the nature of the right being enforced, and not the right to bring the action; that is, one does not generally base an action on injury to the right to bring suit. . . . We are constrained to hold, therefore, that our reasoning in *Strawser* was inappropriate and, insofar as it conflicts herewith, it is overruled.

389 N.E.2d at 320. The court expressed no opinion as to the correctness of the result in *Strawser*. *Id.*

¹³³354 N.E.2d 350 (Ind. Ct. App. 1976). See Garfield, *supra* note 59, at 169 n.82.

¹³⁴354 N.E.2d at 352.

¹³⁵361 N.E.2d at 921.

¹³⁶This determination was not essential in resolving *Kuhn* because contempt enforcement is not available when the children involved are emancipated. See Garfield, *supra* note 125, at 175.

ond judgment was inconsistent with the usual analysis of support orders in a jurisdiction such as Indiana where support orders are not retroactively modifiable. Payments due under such a support order are regarded as becoming final judgments as they accrue.¹³⁷ Unless a support order is retroactively modifiable, a second judgment fixing the amount due is unnecessary because the overdue payments are already final judgments.¹³⁸ Recognizing the inconsistency, the court held in the second *Kuhn* opinion that support installments become judgments as they accrue, "and a second action on the original judgment is unnecessary."¹³⁹

In any case where the amount due under a support order is disputed, it may still be necessary or desirable to obtain a judgment for arrears in Indiana. The number of such cases should decline, however, if full use is made of the Indiana Dissolution of Marriage Act provision authorizing the courts to require that support payments be made through the clerk of the circuit court.¹⁴⁰ Judgments for arrears may also be desirable in some cases when support orders are to be enforced in other states, although they certainly would be unnecessary in many such cases.¹⁴¹ The need for a second judgment for arrears in some cases, however, does not justify *requiring* a second judgment in all cases. The second *Kuhn* decision wisely eliminates this requirement, thereby eliminating the possibility of the requirement being used as a delaying tactic in future cases.

4. *U.R.E.S.A.*—In *State ex rel. Greebel v. Endsley*,¹⁴² the Indiana Supreme Court held that a proceeding to enforce a support

¹³⁷Such an analysis is implicit in the Indiana Court of Appeals decision of *Kniffen v. Courtney*, 148 Ind. App. 358, 266 N.E.2d 72 (1971). The *Kniffen* court held that a *Kentucky* support order, which the court presumed to be modifiable only prospectively as an Indiana order would be, could be enforced in Indiana without the arrearage being first reduced to judgment in Kentucky. *Id.* at 365, 266 N.E.2d at 76. The same analysis is used by the United States Supreme Court in cases involving interstate recognition of support decrees. See *Sistare v. Sistare*, 218 U.S. 1 (1910).

¹³⁸See H. CLARK, *supra* note 112, § 15.3, at 509; Garfield, *supra* note 125, at 174.

¹³⁹389 N.E.2d at 322. Some of the confusion concerning support judgments arises out of their nature. The original order to the parent to pay future support is an equitable decree (in effect, a mandatory injunction). As the payments become due and unpaid, however, they become indistinguishable from other judgments for money and have been treated as such for purposes of interstate enforcement. Thus, the Supreme Court has held that past-due installments under a child support order, when they are not subject to retroactive modification in the state where rendered, are entitled to full faith and credit in other states; that is, they must be enforced in other states as any other money judgment would be. *Sistare v. Sistare*, 218 U.S. 1 (1910).

¹⁴⁰IND. CODE § 31-1-11.5-13(a)-(c) (Supp. 1979).

¹⁴¹See, e.g., *Kniffen v. Courtney*, 148 Ind. App. 358, 266 N.E.2d 72 (1971). Enforcement under the Uniform Reciprocal Enforcement of Support Act, IND. CODE §§ 31-2-1-1 to -39 (1976 & Supp. 1979), normally would *not* require that the arrearage be first reduced to judgment.

¹⁴²379 N.E.2d 440 (Ind. 1978).

order of another state under the Uniform Reciprocal Enforcement of Support Act (U.R.E.S.A.)¹⁴³ was analogous to proceedings supplemental.¹⁴⁴ The trial court was therefore not required to grant the father's motion for a change of venue, and his petition for a writ of mandate and prohibition to compel the court to do so was denied.¹⁴⁵

The proceeding in *Greebel* was brought by the mother to enforce a support order contained in a Pennsylvania divorce decree. The mother was invoking the "additional remedies" for enforcement of "foreign support orders" contained in U.R.E.S.A.¹⁴⁶ The father's argument that this was really a "new and independent cause of action for which a change of venue should be permitted"¹⁴⁷ was clearly not applicable to this type of proceeding. The argument might apply, however, to actions brought under other sections of U.R.E.S.A.,¹⁴⁸ which authorize a *new* determination of support to be made by a court in the responding state. Such a determination can be made even though no prior order of support has been entered in any state and can be based upon duties of support imposed by the law of the responding state.¹⁴⁹ If a prior support order exists, the U.R.E.S.A. order does not purport to enforce it¹⁵⁰ but instead constitutes a separate, parallel remedy.¹⁵¹ Such an order might well be characterized as a "new and independent cause of action,"¹⁵² for which a change of venue arguably should be permitted. The Indiana Supreme Court could have avoided any confusion by carefully distinguishing between the two kinds of remedies available under U.R.E.S.A.

Heretofore, the term "foreign support orders" as used in the Indiana version of U.R.E.S.A. referred to an order entered in another state, the District of Columbia, or in a territory or possession of the United States, in which reciprocal legislation had been

¹⁴³IND. CODE §§ 31-2-1-1 to -39 (1976 & Supp. 1979).

¹⁴⁴379 N.E.2d at 441.

¹⁴⁵*Id.*

¹⁴⁶IND. CODE §§ 31-2-1-32 to -37 (1976 & Supp. 1979). Section 32 bears the heading "Foreign support order: additional remedies." Sections 32 to 37 provide for registration and enforcement of support orders entered in other states.

¹⁴⁷379 N.E.2d at 441.

¹⁴⁸IND. CODE §§ 31-2-1-7 to -31 (1976 & Supp. 1979).

¹⁴⁹*Id.* § 31-2-1-7 (Supp. 1979).

¹⁵⁰*Id.* § 31-2-1-29 (1976) provides:

No order of support issued by a court of this state when acting as a responding state shall supersede any other order of support but the amounts for a particular period paid pursuant to either order shall be credited against amounts accruing or accrued for the same period under both.

See *Banton v. Mathers*, 159 Ind. App. 634, 309 N.E.2d 167 (1974).

¹⁵¹See IND. CODE § 31-2-1-3 (1976), which states: "The remedies herein provided are in addition to and not in substitution for any other remedies."

¹⁵²379 N.E.2d at 441.

enacted.¹⁵³ A 1979 amendment to the definition section makes all provisions of the Indiana statute applicable to foreign countries as well, if they have adopted reciprocal legislation substantially similar to U.R.E.S.A.¹⁵⁴

D. Dissolution of Marriage

1. *Maintenance*.—Only one case involving a maintenance award was decided during the survey period. In *Farthing v. Farthing*,¹⁵⁵ the Indiana Court of Appeals affirmed an order reducing a 1975 maintenance award to the wife from \$55 to \$40 per week. In an appeal brought by the husband, the court held that he had failed to show that the circumstances of the parties had so changed since the original order was entered that the maintenance award was no longer justified under section 9(c) of the Indiana Dissolution of Marriage Act.¹⁵⁶ In so holding, the court first determined the standard for modification of a maintenance order because the Indiana statute¹⁵⁷ does not contain a specific provision relating to modification of maintenance.¹⁵⁸ The court held that the standard for modification of child support orders should be applied to maintenance orders as well: "Such modification shall be made only upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable."¹⁵⁹

The trial court in *Farthing* made specific findings that the wife had "substantially recovered physical health but . . . [had] not fully recovered her mental health," and that the husband "had suffered a substantial loss in income in 1975."¹⁶⁰ These findings supported the

¹⁵³IND. CODE § 31-2-1-2(a) (1976). Such legislation has been enacted in all fifty states, the District of Columbia, Puerto Rico and The Virgin Islands. See Fox, *The Uniform Reciprocal Enforcement of Support Act*, 12 FAM. L.Q. 113, 113 (1978).

¹⁵⁴See IND. CODE § 31-2-1-2(a) (Supp. 1979). Some states have already made reciprocal arrangements with West Germany. See [1979] 5 FAM. L. REP. (BNA) 1153, 2185.

¹⁵⁵382 N.E.2d 941 (Ind. Ct. App. 1978).

¹⁵⁶*Id.* at 944, 947. IND. CODE § 31-1-11.5-9(c) (Supp. 1979) provides that maintenance can be awarded to a spouse only "when the court finds a spouse to be physically or mentally incapacitated to the extent that [his or her] ability . . . to support himself or herself is materially affected."

¹⁵⁷IND. CODE §§ 31-1-11.5-1 to -24 (1976 & Supp. 1979).

¹⁵⁸The legislature clearly intended maintenance awards to be modifiable because § 9(c) authorizes them to be made "during said incapacity, subject to further order of the court." *Id.* § 31-1-11.5-9(c) (Supp. 1979).

¹⁵⁹382 N.E.2d at 943-44; IND. CODE § 31-1-11.5-17(a) (1976). The heading of § 17(a) refers to "modification and termination of provisions for maintenance, support and property disposition" but the body of § 17(a) contains no mention of *maintenance* modification. See *id.*

¹⁶⁰382 N.E.2d at 943.

trial court's order reducing the amount of the maintenance payments but did not support the husband's argument that the trial court was required by the statute to terminate maintenance altogether. Evidently, the husband's argument was directed toward the issue of whether there had been sufficient evidence of incapacity to support the court's original maintenance award. The finding of incapacity in the dissolution decree had been based only on evidence that the wife suffered from "nerves," but the husband had not appealed that judgment.¹⁶¹ The issue of whether evidence of a "nervous condition" is sufficient to support a maintenance award under section 9(c) was therefore not before the court in *Farthing*. This issue remains unresolved.

The United States Supreme Court's recent decision on the constitutionality of statutes allowing awards of alimony (or maintenance) only to wives¹⁶² should have little effect on Indiana law. Section 9(c) already allows maintenance to be awarded to *either* spouse, provided that spouse is incapacitated.¹⁶³

2. *Property Division*.—In three cases decided during the survey period, the Indiana Court of Appeals continued to treat pensions and other retirement benefits as assets to be "considered" but not divided upon dissolution of marriage.¹⁶⁴ In *Libunao v. Libunao*,¹⁶⁵ substantial marital assets were awarded to the wife.¹⁶⁶ The husband contested the property division, alleging that the trial court had abused its discretion by considering his pension and profit sharing plan and his Keough retirement plan without first ascertaining their precise present value.¹⁶⁷ The court of appeals affirmed the division,

¹⁶¹*Id.* at 945. "[T]he Husband is in effect attempting to collaterally attack the basis for the original judgment." *Id.*

¹⁶²*Orr v. Orr*, 99 S. Ct. 1102 (1979), in which it was held that an Alabama statute permitting alimony to be awarded to wives but not to husbands constituted gender-based discrimination in violation of the equal protection clause, U.S. CONST. amend. XIV, § 1. 99 S. Ct. at 1113-14.

¹⁶³IND. CODE § 31-1-11.5-9(c) (Supp. 1979). The Indiana Court of Appeals has been restrictive in interpreting the statutory requirement of incapacity. *See, e.g., Wilcox v. Wilcox*, 365 N.E.2d 792 (Ind. Ct. App. 1977); *Liszkai v. Liszkai*, 343 N.E.2d 799 (Ind. Ct. App. 1976).

¹⁶⁴*See Savage v. Savage*, 374 N.E.2d 536, 538-39 (Ind. Ct. App. 1978), *discussed in* Garfield, *supra* note 59, at 182-85.

¹⁶⁵388 N.E.2d 574 (Ind. Ct. App. 1979).

¹⁶⁶The wife was awarded real estate and cash valued at more than \$250,000. *Id.* at 576. The husband received his interest in the medical building, cash, notes, and stock in the medical corporation, as well as his interests in a pension and profit plan and a Keough plan. The present value of some of these assets was never precisely ascertained, but their total value appears to have been somewhat less than \$200,000. *See id.*

¹⁶⁷The court of appeals defined the issue on appeal as being whether an abuse of discretion was shown "because the marital assets were *divided* in such a manner that one spouse received substantially all of the tangible assets and the other spouse retained

holding that the trial court might “consider the future value of an asset, but [that] the final distribution [had to] be just and equitable” taking into account the “present vested interest” in the asset.¹⁶⁸ For this purpose, the trial court did not have to establish the precise present value of each asset, as long as there was sufficient evidence as to the overall value of the marital property.¹⁶⁹ The court held that the Libunao division was fair in light of the husband’s considerable earning capacity,¹⁷⁰ the wife’s limited earning capacity, and her contributions to her husband’s medical practice.¹⁷¹

In *Hiscox v. Hiscox*,¹⁷² the husband’s military retirement pay had a value which far exceeded that of the other assets accumulated during the marriage. Based on his life expectancy, the husband could expect to receive \$499,545 in retirement pay, which had been earned during the marriage; the wife assessed its discounted present value at \$220,265. Aside from this, the only marital assets were “items of personal property,” worth approximately \$16,000, most of which were awarded to the wife.¹⁷³ The wife argued on appeal that the trial court had erred in refusing to award her any portion of the husband’s retirement pay. The court of appeals held that the trial

only his interest in a pension or retirement fund.” *Id.* at 577. This seems to be somewhat of an overstatement because, as the court itself pointed out, the husband did receive other substantial assets. *Id.*; see note 166 *supra*. It is true, however, that the property distributed to the husband consisted predominantly of intangibles and future interests. Even the medical building was held in a Clifford trust for the benefit of the children; however, the property would revert to the husband on termination of the trust. See 388 N.E.2d at 576.

¹⁶⁸388 N.E.2d at 577.

¹⁶⁹*Id.* at 576-77.

¹⁷⁰He was a physician earning gross income “well in excess of \$100,000 a year.” *Id.* at 576. The wife had not completed high school, but was “capable of performing various types of office work.” *Id.*

¹⁷¹The wife had worked as a bookkeeper in her husband’s office. *Id.* The court also pointed out that the husband had “received over \$20,000 in cash and a substantial amount of equity in his medical practice and stock [in his medical corporation].” *Id.* at 577.

The court of appeals refused to consider the husband’s second allegation of error, relating to the propriety of awarding the parties’ residence to the wife because he had failed to preserve the issue in his motion to correct errors. *Id.* at 578.

¹⁷²385 N.E.2d 1166 (Ind. Ct. App. 1979).

¹⁷³*Id.* at 1166. The wife received personal property valued by the husband at \$13,600. Personalty awarded to the husband was valued by him at \$2,840. The husband also was awarded his interest in real property owned by him jointly with his mother and was ordered to pay the wife \$15,000 (apparently to offset the value of this real property interest). This real property was subject to division under IND. CODE § 31-1-11.5-11 (1976) (amended 1979), but the court evidently did not consider it to be an “asset of the marriage.” See 385 N.E.2d at 1166-67. In addition, both parties were awarded their respective retirement benefits. *Id.* at 1167. No valuation of the wife’s retirement benefits is reported in the *Hiscox* opinion.

court's division was correct because the retirement pay was "not a vested present interest."¹⁷⁴ Because the husband already had retired and was receiving monthly retirement payments at the time of the hearing, the court's characterization of these benefits as not being "vested" warrants closer examination.

The definition of vesting used by the court of appeals in *Hiscox* was derived from *Savage v. Savage*,¹⁷⁵ an earlier case in which the husband had retired and was receiving railroad retirement benefits at the time of the divorce.¹⁷⁶ The court held in *Savage* that the husband did not have "a sufficient vested present interest" in his future pension payments to qualify them as property subject to division under the Indiana Dissolution of Marriage Act¹⁷⁷ because the payments were "contingent upon his continued survival."¹⁷⁸ In *Savage*, the court had relied in turn upon *Wilcox v. Wilcox*,¹⁷⁹ in which it was held that a husband's future earnings were not property subject to division on dissolution because he had no "vested present interest" in them.¹⁸⁰ Although the court conceded in *Savage* that there might be "material differences" between future earnings and future pension payments,¹⁸¹ it nevertheless treated them the same, apparently because both constituted "income to be received in the future."¹⁸² The court ignored important differences between future earnings and future pension payments that far outweigh any such superficial similarity. For purposes of dividing the property of divorcing spouses "in a just and reasonable manner,"¹⁸³ the crucial distinction would seem to be that future earnings are to be earned in the future, *after* the marriage is dissolved, whereas future retirement benefits are earned *during* the marriage, although they may not be payable until after dissolution. Retirement benefits are a form of deferred compensation, a fringe benefit derived from a spouse's employment during the marriage.¹⁸⁴ The court of appeals implicitly recognized this by holding in *Libunao* that retirement benefits should be "considered" in making an equitable division of

¹⁷⁴385 N.E.2d at 1168.

¹⁷⁵374 N.E.2d 536 (Ind. Ct. App. 1978).

¹⁷⁶The *Savage* opinion did not identify the payments as railroad retirement benefits, but the *Hiscox* court did. 385 N.E.2d at 1167.

¹⁷⁷IND. CODE § 31-1-11.5-11 (Supp. 1979).

¹⁷⁸374 N.E.2d at 538-39.

¹⁷⁹365 N.E.2d 792 (Ind. Ct. App. 1977). Both *Wilcox* and *Savage* are discussed in Garfield, *supra* note 59, at 178-84.

¹⁸⁰365 N.E.2d at 795.

¹⁸¹374 N.E.2d at 539.

¹⁸²*Id.*

¹⁸³IND. CODE § 31-1-11.5-11 (Supp. 1979).

¹⁸⁴*See Brown v. Brown*, 15 Cal. 3d 838, 843, 544 P.2d 561, 563, 126 Cal. Rptr. 633, 635 (1976).

property.¹⁸⁵ The Indiana Court of Appeals has not answered one vital question: How *can* pension rights be "considered" in a case in which there is no other property to divide? The question seems unanswerable. The court has held in *Wilcox*¹⁸⁶ and *Savage*¹⁸⁷ that any award of property over and above the value of the tangible assets of the marriage would constitute an award of maintenance in violation of section 9(c).¹⁸⁸ Under this holding, no award can be made in any case in which pension rights constitute the only substantial asset.

In these pension cases, the Indiana Court of Appeals has used the term "vested" in a sense that is very different from the term's usual meaning in pension matters. In federal legislation governing pension rights, the word "vesting" refers to pension rights that are not forfeited when the employee terminates his employment.¹⁸⁹ Similarly, in pension cases from other states, the term "vested" is used to indicate "a pension right which survives the discharge or voluntary termination of the employee."¹⁹⁰ Such a vested pension right is subject to division on dissolution of marriage in many states,¹⁹¹ and some states allow non-vested pension rights to be divided as well.¹⁹² In states in which pensions cannot be divided as property, pensions *can* be considered in awarding alimony or

¹⁸⁵388 N.E.2d at 577.

¹⁸⁶365 N.E.2d at 794-95.

¹⁸⁷374 N.E.2d at 539.

¹⁸⁸IND. CODE § 31-1-11.5-9(c) (Supp. 1979). See Garfield, *Indiana's Displaced Homemakers*, 23 RES GESTAE 80 (1979).

¹⁸⁹The Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1053 (1976), describes pension rights which are nonforfeitable under the heading "minimum vesting standards." It specifies that a right is not considered forfeitable merely because it is contingent upon the employee's survival. *Id.* § 1053(a)(3)(A). "Non-forfeitable" is defined as a pension benefit or right arising from employment "which is unconditional, and which is legally enforceable against the plan." *Id.* § 1002(19).

¹⁹⁰*In re Marriage of Brown*, 15 Cal.3d 838, 843, 544 P.2d 561, 563, 126 Cal. Rptr. 633, 635 (1976). *Brown* distinguishes between a "vested" pension right and one that has "matured:"

Depending upon the provisions of the retirement program, an employee's right may vest after a term of service even though it does not mature until he reaches retirement age and elects to retire. Such vested but immature rights are frequently subject to the condition, among others, that the employee survive until retirement.

Id. Under this definition, the pension rights in *Hiscox* and *Savage* were both "vested" and "matured."

¹⁹¹*E.g.*, *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975); *Swope v. Mitchell*, 324 So. 2d 461 (La. Ct. App. 1975); *Hutchins v. Hutchins*, 71 Mich. App. 365, 248 N.W.2d 276 (1976); *Schafer v. Schafer*, 3 Wis. 2d 166, 87 N.W.2d 803 (1958).

¹⁹²*E.g.*, *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). When too many uncertainties exist to permit division of future pension rights at the time of the divorce, the court can award the other spouse a portion of each payment as it is received. *Id.* This is precisely the method that was used by the trial court in *Savage*.

maintenance because retirement income is clearly relevant to a spouse's ability to pay.¹⁹³ In Indiana, however, if the pension itself cannot be divided, the other spouse may get nothing. The spouse can be awarded other property, if there is any, or he or she can receive maintenance, if incapacitated. If no other property exists and the other spouse is not incapacitated, an Indiana court cannot make *any* award regardless of the value of the pension rights. In such a situation, no truly equitable resolution of the spouses' financial affairs is possible.

A recent decision of the United States Supreme Court has confused the picture further. In *Hisquierdo v. Hisquierdo*,¹⁹⁴ the Court held that California could not treat anticipated benefits under the Railroad Retirement Act¹⁹⁵ as community property upon dissolution of marriage.¹⁹⁶ The decision is based upon the Court's interpretation of the federal statute, particularly the provision prohibiting assignment or anticipation of benefits.¹⁹⁷ The Court also noted that benefits under the statute have some of the attributes of a social welfare plan and were designed in part as a substitute for social security.¹⁹⁸ Although Congress has provided social security benefits

¹⁹³Several states have expressly held that retirement income should be considered in awarding maintenance or alimony. *E.g.*, *Ellis v. Ellis*, 552 P.2d 506 (Colo. 1976); *Howard v. Howard*, 196 Neb. 351, 242 N.W.2d 884 (1976). In no other state, with the possible exception of Pennsylvania, is the decision about whether pensions are properly subject to division on dissolution as crucial as it is in Indiana. In all other states, except Pennsylvania and Texas, awards of alimony or maintenance can be made on divorce without the limitation of incapacity contained in the Indiana statute. *See Freed & Foster, Divorce in the Fifty States: An Overview as of August 1, 1978*, [1978] 4 FAM. L. REP. (BNA) 4033, 4038. In Texas, pension rights are treated as community property subject to division on divorce. *E.g.*, *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977). 1977).

¹⁹⁴99 S. Ct. 802 (1979).

¹⁹⁵45 U.S.C. § 231 (1976 & Supp. I 1977).

¹⁹⁶99 S. Ct. at 813.

¹⁹⁷The statute provides, in part:

Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, *no annuity or supplemental annuity shall be assignable* or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, *nor shall the payment thereof be anticipated*.

45 U.S.C. § 231m (1976) (emphasis added). There is an exception to this provision for child support or alimony. *Id.* § 659.

¹⁹⁸The *Hisquierdo* court described the benefits under the statute:

[T]he Act resembles both a private pension program and a social welfare plan. It provides two tiers of benefits. The upper tier, like a private pension, is tied to earnings and career service. . . .

The lower, and larger, tier of benefits corresponds exactly to those an employee would expect to receive were he covered by the Social Security Act.

99 S. Ct. at 804-05.

for divorced spouses, it has made no similar provision concerning benefits under the Railroad Retirement Act.¹⁹⁹ The *Hisquierdo* decision is limited by its reasoning to railroad retirement benefits because it rests upon the Court's interpretation of the Railroad Retirement Act. *Hisquierdo* should not be construed as establishing a general federal rule against treating pensions and other types of retirement benefits as community property or as property subject to equitable division on divorce.²⁰⁰

The effect of *Hisquierdo* on divorcing couples in California and in most other states may be minimal because a spouse's pension rights can be taken into account in making an award of alimony or maintenance.²⁰¹ Having lost her community property right to a share of her husband's retirement benefits, Mrs. *Hisquierdo* can probably qualify for an award of alimony, which can then be enforced against the retirement benefits.²⁰² In Indiana, however, the effect of the *Hisquierdo* interpretation of the Railroad Retirement Act would have been much more drastic, if *Savage* and *Hiscox* had not already led to the same result. *Hisquierdo* makes it less likely that the Indiana courts will change their treatment of pensions on dissolution of marriage because such a change could not affect railroad retirement benefits. Under *Hisquierdo*, railroad benefits could only be made available to the other spouse through an award of maintenance, which is not possible in most cases under the Indiana statute. Evidently, Congress assumed that state divorce laws would authorize that a provision be made for nonworking spouses in the form of alimony or maintenance when it provided an exception to the provision prohibiting anticipation of Railroad Retirement Act benefits which apply to alimony awards.²⁰³ This exception, however, is largely ineffective in Indiana.

¹⁹⁹A proposal to amend the statute to provide a benefit to divorced spouses was specifically rejected in 1974. *Id.* at 810.

²⁰⁰A somewhat similar question may arise under the Employee Retirement Income Security Act (ERISA), which contains a provision against assignment or alienation. 29 U.S.C. § 1056(d)(1) (1976). See Bass, *ERISA and the Treatment of Pensions etc., as Property Divisible on Divorce*, [1978] 4 FAM. L. REP. (BNA) 4009, 4010. The reasoning of *Hisquierdo*, however, would not foreclose a different result under ERISA.

²⁰¹In determining to treat unvested pension rights as community property rather than as the basis for an award of alimony, the California Supreme Court reasoned that the nonworking spouse's entitlement to a share of the working spouse's pension should be a matter of right, rather than dependent upon the trial court's discretion, as alimony awards are. *In re Marriage of Brown*, 15 Cal. 3d 838, 848, 544 P.2d 561, 567, 126 Cal. Rptr. 633, 639 (1976).

²⁰²The prohibition against alienation of benefits under the Railroad Retirement Act contains an exception for alimony and child support. 42 U.S.C. § 659 (1976); see *Hisquierdo*, 99 S. Ct. at 806.

²⁰³42 U.S.C. § 659 (1976).

In *Goodwill v. Goodwill*,²⁰⁴ the wife received \$6,000 in cash as part of a property division. This award was made a lien upon the husband's anticipated railroad retirement benefits.²⁰⁵ Because the parties' property was heavily encumbered, the \$6,000 exceeded the net value of the marital assets. The trial court made no finding of incapacity that would justify the payment as an award of maintenance. The court of appeals reversed, citing *Savage*.²⁰⁶ Because no tangible property existed,²⁰⁷ the wife was entitled to nothing. Neither the husband's present earning capacity nor his pension rights could be considered under these circumstances. Even if the cash award could have been justified as a division of property, it could not be made a lien on the husband's railroad retirement benefits under *Hisquierdo*. Although *Goodwill* was decided before *Hisquierdo*, the Indiana decision is thus consistent with the Supreme Court's reading of the Railroad Retirement Act. The ultimate outcome of *Goodwill*, however, was probably not one that was anticipated either by Congress or by the Supreme Court. The denial of any financial settlement to the wife in *Goodwill* results from *Wilcox* and *Savage*, which effectively limit property available for division on dissolution to tangible assets.

The tangible asset limitation of *Wilcox* was avoided by the court of appeals in *In re Marriage of McManama*,²⁰⁸ which affirmed an award of \$3,600 to a wife who had contributed to her husband's expenses as a student at Notre Dame Law School. The dissolution decree also awarded the wife the only substantial asset owned by the parties, a residence in South Bend; she was made responsible for the mortgage on it. Each party received the personal property in his

²⁰⁴382 N.E.2d 720 (Ind. Ct. App. 1978).

²⁰⁵The cash award was designated as an "alimony judgment," but the court of appeals treated it as an "attempted property division" because alimony is no longer awarded under the present Indiana statute. *Id.* at 721-22.

²⁰⁶*Id.* at 722-23.

²⁰⁷The parties' real estate and furniture were subject to encumbrances which exceeded their value. The only other asset was a 1966 Pontiac. The wife received household furniture worth \$1,500, in addition to the cash award, but this phase of the division was not appealed. Thus, the court did not have to determine whether this cash award also constituted an award in excess of the value of the tangible assets of the marriage. *See id.* at 721.

²⁰⁸386 N.E.2d 953 (1979). Judge Staton, in dissent, observed that *McManama* is inconsistent with *Wilcox* because the cash award "of the husband's future income to the wife is above the total value of the marital assets." *Id.* at 956 (Staton, J., dissenting). The relevant conflict with *Wilcox* is the fact that the award exceeded the value of the marital assets, not the fact that it was payable out of the husband's future income. An award payable out of the other spouse's future income would not be inconsistent with *Wilcox* if tangible property of equal or greater value had been awarded to the paying spouse.

or her possession, and the husband was made responsible for debts totalling \$1,080.²⁰⁹ The parties' tangible assets had been divided before the cash award was made to the wife, with the bulk of the assets going to the wife. The \$3,600 was therefore an award "over and above the actual physical assets of the marital relationship," which, under *Wilcox*, "must represent some form of support or maintenance."²¹⁰ The two cases are distinguishable, however. In *McManama*, the wife did not receive the cash award to compensate her for the husband's greater earning power as the wife had sought to do in *Wilcox*.²¹¹ The *McManama* award was in the nature of restitution for sums contributed by the wife to her husband's legal education. The court of appeals relied on the provision of the property division statute which permits the trial court to consider "the conduct of the parties . . . as related to the disposition or dissipation of their property."²¹² The court interpreted the \$3,600 award as compensating the wife for marital assets "dissipated" for the sole benefit of the husband.²¹³

Although it is difficult to reconcile *McManama* with the broad statements in *Wilcox* limiting property available for division to "actual physical assets,"²¹⁴ the court of appeals is certainly correct in its conclusion that the *McManama* award bears little resemblance to maintenance. Unlike the wives in *Wilcox* and *Savage*, Mrs. *McManama* was probably not entitled to maintenance even if the Indiana statute allowed it. Such an award would have to be based upon her need and her husband's ability to pay.²¹⁵ At the time of the separation, she was earning considerably more than her husband;²¹⁶

²⁰⁹The debts were for the husband's medical bill (\$500), a balance due on his law school tuition (\$220), and a federal tax liability (\$360). *Id.* at 954.

²¹⁰365 N.E.2d at 794. No maintenance award would be permissible under the facts of *McManama* because the wife was not "incapacitated," as required by IND. CODE § 31-1-11.5-9(c) (Supp. 1979).

²¹¹IND. CODE § 31-1-11.5-11(e) (1976) (amended 1979) permits a court to consider the "earnings or earning ability of the parties" in making an equitable division of property on dissolution. The wife in *Wilcox* had argued that the court should consider the husband's future income as an asset subject to division. 365 N.E.2d at 794.

²¹²386 N.E.2d at 955; IND. CODE § 31-1-11.5-11(d) (1976) (amended 1979).

²¹³386 N.E.2d at 955. When the husband began his law school career, the parties had \$6,000 in cash, most of which was spent during his first year in law school. The wife worked full-time during this period, and the parties separated the following summer. *Id.* at 953-54.

²¹⁴365 N.E.2d at 794.

²¹⁵*See, e.g.*, UNIFORM MARRIAGE AND DIVORCE ACT § 307.

²¹⁶She earned \$14,785 during the preceding year working as a full-time school psychologist. He had earned \$1,250 on a summer job as an assistant in the public defender's office. 386 N.E.2d at 953-54. On these facts, it is doubtful that she could have shown the need for maintenance. *See In re Marriage of Graham*, 574 P.2d 75, 78-79 (Colo. 1978) (Carrigan, J., dissenting).

therefore, an award based on her support needs would have been difficult to justify. In similar situations, some state courts have treated advanced education, or the increased earning capacity resulting therefrom, as an asset subject to division on dissolution of marriage,²¹⁷ but such an interpretation apparently is foreclosed in Indiana by the holdings of *Wilcox* and *Savage*. In any event, the Indiana legislature has now amended the property division statute²¹⁸ to authorize the kind of award made in *McManama*.²¹⁹

One additional property division case deserves mention.²²⁰ Generally, disputes over the amount of fees ordered to be paid by one spouse to the attorney of the other²²¹ are resolved without much discussion. Such awards are confirmed absent a "clear abuse of discretion."²²² In *Greiner v. Greiner*,²²³ however, the propriety of an

²¹⁷*In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978); *Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979).

²¹⁸Act of Apr. 10, 1979, Pub. L. No. 9, § 1, 1979 Ind. Acts 1375 (amending IND. CODE § 31-1-11.5-11 (Supp. 1979)).

²¹⁹A new § 11(b) now provides:

When the court finds there is little or no marital property, it may award either spouse a money judgment not limited to the existing property. However, this award may be made only for the financial contribution of one (1) spouse toward tuition, books, and laboratory fees for the higher education of the other spouse.

IND. CODE § 31-1-11.5-11(b) (Supp. 1979). Unfortunately, this carefully limited amendment may be interpreted as confirming the tangible assets limitation of *Wilcox* and *Savage*. In extending relief *only* to the working spouse who helps put her husband through school, the amendment implies that, in all other cases, awards are properly "limited to the existing property." *Id.*

²²⁰Other cases decided during the survey period present issues of limited general interest. *In re Marriage of Hirsch*, 385 N.E.2d 193 (Ind. Ct. App. 1979), was mainly concerned with a dispute over property valuations.

In *Blake v. Hosford*, 387 N.E.2d 1335 (Ind. Ct. App. 1979), the parties had been divorced in Arizona, but the decree failed to mention real property owned by the parties in Indiana. The court of appeals held that a letter written by the wife was insufficient under the Statute of Frauds, IND. CODE § 32-3-1-1 (1976), as a memorandum of an oral agreement by the wife to convey her interest in the real estate to the husband.

Henderson v. Henderson, 381 N.E.2d 451 (Ind. 1978), held that the signature of the husband's attorney, "approving" a divorce decree, indicated approval as to form only and did not constitute a waiver of errors. The case was transferred to the court of appeals for a decision on the merits.

In re Marriage of Brown, 387 N.E.2d 72 (Ind. Ct. App. 1979), held that the wife's motion for change of venue, filed within 30 days after she filed her petition for dissolution, should have been granted by the trial court under IND. R. TR. P. 76(3). Because a responsive pleading is permissive rather than mandatory in dissolution cases, the court held that the 10-day limitation of IND. R. TR. P. 76(2) had no application to such cases.

²²¹IND. CODE § 31-1-11.5-16 (1976) authorizes the award of reasonable attorney's fees.

²²²*E.g.*, *In re Marriage of Hirsch*, 385 N.E.2d 193, 197 (Ind. Ct. App. 1979); *Farthing v. Farthing*, 382 N.E.2d 941, 947 (Ind. Ct. App. 1978).

²²³384 N.E.2d 1055 (Ind. Ct. App. 1979).

award of \$12,400 to the wife's attorney was the only issue on appeal, and the court of appeals affirmed the award in a split decision.²²⁴ The fee awarded was admittedly more than could be justified on an hourly basis.²²⁵ The case was ultimately resolved as a non-contested matter, with a property settlement agreement prepared by another attorney.²²⁶ The trial court evidently believed, however, that work done by the wife's original attorney of record, largely in discovery proceedings aimed at ascertaining the value of assets held by the husband, may have contributed to the ultimate resolution of the case.

Judge Staton argued, in dissent, that the trial court improperly relied on the Hammond bar fee schedule in determining what a reasonable attorney's fee would be. Because the schedule permitted a fee based on a percentage of the property settlement, reliance on the schedule to determine fees came perilously close to authorizing a contingent fee.²²⁷ This argument is somewhat diluted because the fee actually awarded in *Greiner* was approximately one-half of the amount prescribed by the bar schedule. The majority concluded that the trial court could consider the bar schedule as evidence of a reasonable fee and noted that under Indiana cases a judge could "take judicial notice of what a reasonable fee would be, even in the absence of any evidence in the record."²²⁸

E. Marriage

The Indiana Supreme Court, in *Miller v. Morris*,²²⁹ invalidated a provision of the Indiana marriage statutes which prohibited the issuance of a marriage license to any person who had not complied

²²⁴*Id.* at 1060. Judge Staton dissented. *Id.* at 1060-63 (Staton, J., dissenting).

²²⁵There was testimony that a fee based on the hourly rate usually charged in the area would have been \$4,800 or \$5,000. *Id.* at 1058.

²²⁶Mrs. Greiner did not discharge her attorney but agreed to the settlement against her own attorney's advice. *Id.* at 1057, 1059.

Judge Staton's dissent expressed the belief that the trial court had erred in treating the dissolution as a "contested matter" because neither party contested the dissolution itself. *Id.* at 1060-61 (Staton, J., dissenting). In dissolution of marriage actions, however, the real contest usually takes place over financial matters or custody. The fact that an action is ultimately resolved on an agreed property settlement does not necessarily mean that there was no contest. In the view of the majority, there was sufficient evidence that the attorney's work was difficult to justify the award. *Id.* at 1060.

²²⁷*Id.* at 1062 n.1 (Staton, J., dissenting). Contingent fees are not permitted in divorce cases. *Barelli v. Levin*, 144 Ind. App. 576, 247 N.E.2d 847 (1969).

²²⁸*Geberin v. Geberin*, 360 N.E.2d 41, 47 (Ind. Ct. App. 1977), *quoted in* 384 N.E.2d at 1060. The court noted that the presumption in favor of a trial court's determination of attorney fees in dissolution cases is "one of the strongest presumptions applicable" in an appeal. 384 N.E.2d at 1060.

²²⁹386 N.E.2d 1203 (Ind. 1979).

with a court order for support of his minor children.²³⁰ The court affirmed a trial court decision holding that this provision violated the equal protection clause²³¹ under *Zablocki v. Redhail*.²³² The United States Supreme Court held in *Zablocki* that a Wisconsin statute similar to Indiana's deprived marriage license applicants with dependent children of equal protection because it unduly burdened their fundamental right to marry.²³³ Because the statutory classification²³⁴ "significantly interfere[d]" with a fundamental right, it was subjected to the court's highest level of scrutiny: the state was required to show that the statute furthered "important state interests" and that it was "closely tailored to effectuate only those interests."²³⁵ Although the state's interest in the welfare of children was conceded to be substantial, the Court held that the statute was neither necessary to further this interest, nor carefully tailored to achieve its objective.²³⁶

²³⁰IND. CODE § 31-1-3-3 (Supp. 1979) provides that no license shall be issued to persons adjudged "of unsound mind," afflicted with a "transmissible disease," or "under the influence of an intoxicating liquor or narcotic drug" at the time of application for the license. The statute also provides: "[N]or shall a license be issued to any person who has dependent children unless that person accompanies his application with satisfactory proof that he is supporting or contributing to the support of each dependent child in compliance with any court order or orders issued for their support." *Id.*

²³¹U.S. CONST. amend. XIV, § 1.

²³²434 U.S. 374 (1978). The Indiana trial court held that this portion of the statute was severable from the remaining provisions of IND. CODE § 31-1-3-3 (Supp. 1978). 386 N.E.2d at 1204.

²³³434 U.S. at 383, 386-87. The Supreme Court criticized the Wisconsin statute: Some of those in the affected class, like appellee . . . are absolutely prevented from getting married. Many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into foregoing their right to marry. And even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental.

Id. at 381. The decision to marry is one of the personal decisions which the Court has held to be protected by the due process right to privacy. *Id.* at 384 (citing *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

²³⁴The Court identified the class created by the Wisconsin statute as, in the words of the statute, any "Wisconsin resident having minor issue not in his custody and which he is under an obligation to support by any court order or judgment." 434 U.S. at 375 (quoting WIS. STAT. § 245.10 (1973)).

²³⁵434 U.S. at 388. Although the Court did not use the words "compelling state interest," the analysis used in *Zablocki* seems to be identical to that used in other equal protection cases in which state statutes were held to burden the fundamental right of interstate movement. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969).

²³⁶*See* 434 U.S. at 388-91. The State claimed that the statute provided an incentive for parents to make support payments. However, the Court found the incentive unnecessary because many other remedies for enforcement of support obligations already existed. *Id.* at 388. The statutory classification was found to be underinclusive because

The Indiana statute was somewhat less restrictive than the Wisconsin statute invalidated in *Zablocki* because it did not require a court order in every case in which a parent was obligated to support dependent children not in his custody. Nor did it require a showing that the children were not likely to become public charges.²³⁷ The effect of the Indiana statute, however, was to deny the right to marry to many persons who were unable to demonstrate compliance with prior support orders, regardless of the reason for the noncompliance.²³⁸ The interests advanced in justification of the Indiana statute were similar to those advanced by the State of Wisconsin in *Zablocki*, and the Indiana court's answers paralleled those of the Supreme Court.²³⁹ The argument advanced in *Miller*, but not in *Zablocki*, that "members of the affected class can seek modification of their support orders" and then be free to marry,²⁴⁰ is untenable in view of the Indiana rule that support obligations are not retroactively modifiable.²⁴¹ A support order might be modified as to future payments, but presumably "compliance" under the statute would require that all arrears be paid. If the applicant could not pay the arrears, he would be unable to obtain a marriage license and would be effectively foreclosed from exercising his fundamental right to marry.²⁴²

F. Paternity

1. *Presumptions.*—A strong presumption exists that a child born during marriage is legitimate, which can be rebutted only by

it did not limit any new financial commitments except marriage and overinclusive because it failed to take into account the possibility that remarriage (to a working spouse) might actually improve an applicant's ability to satisfy prior support obligations. *Id.* at 390. The Court pointed out that the statute might result in more children being born out of wedlock. *Id.* An additional purpose asserted by the State, that of encouraging persons with prior support obligations to obtain counseling, was rejected because the statute contained no provision for counseling. *Id.* at 388-89.

²³⁷See 386 N.E.2d at 1206 (Ind. 1979) (Pivarnik, J., dissenting).

²³⁸The statute might have been salvaged if it had been interpreted as being inapplicable to anyone who could show that his noncompliance was due to inability to pay. The Supreme Court, however, impliedly rejected any such interpretation when it stated in *Zablocki* that having to seek a court order might in itself coerce many persons into foregoing their right to marry. See 434 U.S. at 387.

²³⁹386 N.E.2d at 1204-05 (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978)).

²⁴⁰386 N.E.2d at 1204.

²⁴¹For a discussion of cases dealing with modification of support orders, see notes 99-123 *supra* and accompanying text.

²⁴²Justice Pivarnik's dissent conceded that the right to marry is fundamental, but concluded that the statute was a "permissible exercise of the state's power to regulate family life and to assure the support of minor children." 386 N.E.2d at 1206 (Pivarnik, J., dissenting). The statute therefore bore a "rational relation to a constitutionally permissible objective." *Id.* This is not the standard of review utilized for statutes which violate fundamental rights, however. Such statutes must be shown to be necessary to further a compelling state interest. See note 235 *supra* and accompanying text.

"irrefutable proof."²⁴³ The issue in *L.F.R. v. R.A.R.*²⁴⁴ was whether this presumption should apply when the child was born after the marriage had been dissolved and was conceived after the parties had separated and dissolution proceedings had been commenced by the husband. A majority of the Indiana Supreme Court held that the presumption *did* apply, vacating a court of appeals decision to the contrary.²⁴⁵

Although the testimony of the parties was in conflict, it was undisputed that the husband had access during the relevant period.²⁴⁶ Because he had access, his denial that the parties had sexual relations was insufficient to overcome the presumption that he was the child's father. When a child is born "in wedlock," the presumption of legitimacy can be overcome only by evidence proving conclusively that the husband could not have been the father.²⁴⁷ The child in *L.F.R.* was born out of wedlock only because the trial court had allowed the dissolution action to go to final hearing, over the wife's objections, before the child was born. The Indiana Supreme Court indicated that the trial court should have delayed the dissolution until after the child's birth. The presumption of legitimacy then unquestionably would have applied. The court reasoned that the "unusual procedural sequence" actually followed should not be allowed to render the presumption inapplicable.²⁴⁸

²⁴³*Buchanan v. Buchanan*, 256 Ind. 119, 123, 267 N.E.2d 155, 157 (1971).

²⁴⁴378 N.E.2d 855 (Ind. 1978).

²⁴⁵*Id.* at 857. The court of appeals had affirmed the trial court's determination, in the dissolution of marriage action, that R.A.R. was not the father of the child born to his former wife. 370 N.E.2d 936 (Ind. Ct. App. 1977), *vacated*, 378 N.E.2d 855 (Ind. 1978). Justice DeBruler dissented in the supreme court, in an opinion in which Justice Prentice concurred. 378 N.E.2d at 857 (DeBruler, J., dissenting).

²⁴⁶R.A.R. testified that he had seen and talked to L.F.R. after the separation, but denied having sexual relations with her. 378 N.E.2d at 856.

²⁴⁷*Id.* The evidence necessary to overcome the presumption was described as follows:

[T]he presumption could be overcome by proof that the husband was *impotent*; or that he was entirely absent so as to have had *no access to the mother*; or was entirely absent at the time the child in the course of nature must have been begotten; or was present only under such circumstances as to afford clear and satisfactory proof that there was no sexual intercourse.

Whitman v. Whitman, 140 Ind. App. 289, 292, 215 N.E.2d 689, 690 (1966), *quoted in* 378 N.E.2d 855, 856 (1978) (emphasis in original).

²⁴⁸378 N.E.2d at 857. The dissent believed, however, that the presumption should not apply unless the child was actually born "during wedlock." *Id.* (DeBruler, J., dissenting). Under this view, the trial court had complete power to control the application of the presumption because its application would depend upon the date set for final hearing in the dissolution action. In *L.F.R.*, the trial court could have made the presumption applicable simply by sustaining L.F.R.'s objection to holding the final hearing before the child was born.

In *Toller v. Toller*,²⁴⁹ the child had been born *before* the parties married but after the mother's first husband had filed a divorce complaint, alleging that she was pregnant by another man.²⁵⁰ The Tollers' marriage lasted about eighteen months. The mother then filed the present action for dissolution, alleging that the child had been born as the issue of the marriage. A final decree was entered, awarding custody to the mother and ordering the husband to pay child support. The husband made no objection to the decree. More than two years later, he filed a motion for relief from the judgment under Trial Rule 60(B)(8).²⁵¹ The trial court denied the motion, and the court of appeals affirmed, holding that the husband had waived any claim of error by failing to file his motion within a reasonable time.²⁵² The facts of *Toller* indicate that the weighty presumption recognized in *L.F.R.* can cut both ways. If Toller had raised the paternity issue during the dissolution action, rather than two years later, the wife probably could not have overcome the presumption that her *first* husband was the father of the child. The result could have been to deny the child any right to support from Toller, even though up to that point he had at least tacitly acknowledged that the child was his. In many similar situations, the ultimate result may be to leave the child without support from *either* husband.

2. *Procedure.*—Two other paternity cases decided during the survey period were concerned with procedural issues. In *D.M. v. C.H.*,²⁵³ nearly five years elapsed after the mother filed her complaint before any action was taken to set the case for hearing. The putative father, however, did not file his motion to dismiss for lack of prosecution²⁵⁴ until after the mother had requested a trial date. The court of appeals upheld the trial court's denial of the motion.²⁵⁵

In *J.Y. v. D.A.*,²⁵⁶ the court of appeals affirmed an order declaring J.Y. to be the father of D.A.'s child and ordering him to pay \$20 per week as child support. The trial court had imposed sanctions on the mother for failing to answer interrogatories after the court had

²⁴⁹375 N.E.2d 263 (Ind. Ct. App. 1978).

²⁵⁰The record in *Toller* is unclear about whether the divorce decree had been issued before or after the child was born. *Id.* at 264. In either case, under *L.F.R.*, a very strong presumption would have arisen that the first husband was the child's father, but *Toller* was decided before the Indiana Supreme Court decided *L.F.R.*

²⁵¹IND. R. TR. P. 60(B)(8) authorizes a court to grant relief from a judgment for "any other reason justifying relief from the operation of a judgment." The rule specifies that the motion "shall be made within a reasonable time." *Id.*

²⁵²375 N.E.2d at 265.

²⁵³380 N.E.2d 1269 (Ind. Ct. App. 1978).

²⁵⁴See IND. R. TR. P. 41(E).

²⁵⁵380 N.E.2d at 1270.

²⁵⁶381 N.E.2d 1270 (Ind. Ct. App. 1978).

ordered her to do so.²⁵⁷ The court later lifted the sanctions after the interrogatories had been answered. The court of appeals held that removal of the sanctions was not an abuse of the trial court's discretion.²⁵⁸

3. *Statutory Changes.*—Before the new Juvenile Code became effective October 1, 1979, its provisions relating to paternity actions were amended or repealed,²⁵⁹ and a new paternity statute enacted.²⁶⁰ The new statute recognizes the interests of the child and the father in the determination of paternity. A paternity action can now be filed by a man claiming to be the father (or expectant father) of a child, or by the child itself.²⁶¹ Under the former statute, the prosecuting attorney was authorized to act as the attorney for the mother on her request.²⁶² Now, *any* of the parties who can initiate the action can request that the prosecuting attorney initiate it, but when he does, he acts as the *child's* attorney.²⁶³ The new statute retains the two-year statute of limitations of the former statute,²⁶⁴ but it does not apply to an action brought by the child or to an action brought by a man alleging that he is the father, if the mother has acknowledged his paternity in writing.²⁶⁵

²⁵⁷The court had ordered that evidence concerning the matters contained in the interrogatories would be refused at trial under IND. R. TR. P. 37(B)(3).

²⁵⁸381 N.E.2d at 1271.

²⁵⁹Act of April 10, 1979, Pub. L. No. 277, § 4, 1979 Ind. Acts 1446 (repealing IND. CODE § 31-6-3-3 (Supp. 1978)); Act of April 10, 1979, Pub. L. No. 277, § 4, 1979 Ind. Acts 1446 (repealing IND. CODE § 31-6-6-1 to -22 (Supp. 1978)); Act of April 10, 1979, Pub. L. No. 277, § 2, 1979 Ind. Acts 1446 (amending IND. CODE § 31-6-7-8 (Supp. 1978)); Act of April 10, 1979, Pub. L. No. 277, § 3, 1979 Ind. Acts 1447 (amending IND. CODE § 31-6-7-15 (Supp. 1978)).

²⁶⁰Act of April 10, 1979, Pub. L. No. 277, § 1, 1979 Ind. Acts 1446 (codified at IND. CODE § 31-6-6.1-1 to -19 (Supp. 1979)).

²⁶¹IND. CODE § 31-6-6.1-2(a) (Supp. 1979). *Id.* § 31-6-6.1-2(a). Under the former statute, a father could file *only* if the mother joined in a voluntary petition to establish paternity. *Id.* § 31-6-6-8 (Supp. 1978) (repealed 1979). Otherwise, the action could be brought only by the mother. *Id.* § 31-6-6-9(a).

²⁶²*Id.* § 31-6-6-20 (Supp. 1978) (repealed 1979).

²⁶³*Id.* § 31-6-6.1-3 (Supp. 1979).

²⁶⁴*Id.* § 31-6-6-17 (Supp. 1978) (repealed 1979).

²⁶⁵*Id.* § 31-6-6.1-6(a)(4), (b) (Supp. 1979). The child may file a paternity petition at any time until his twentieth birthday. *Id.* § 31-6-6.1-6(b). However, any action must be filed within five years after the alleged father's death. *Id.* § 31-6-6.1-6(c). This is the only provision of the new statute indicating that the action survives the death of the alleged father. Under the former statute, paternity had to be established during the father's life, but the obligation (established either by court order or by his voluntary acknowledgement) was enforceable against his estate. *Id.* § 31-6-6-7 (Supp. 1978) (repealed 1979). The new statute contains no comparable provision authorizing enforcement of a support order against the father's estate, but if the action itself can be commenced after his death, it would seem to follow by necessary implication that an existing order could be enforced after his death. A child support order issued under the Indiana Dissolution Act survives the death of the obligor parent. *Id.* § 31-1-11.5-17(b) (Supp. 1979).

The new statute creates presumptions of paternity when (1) the putative father and the mother go through a ceremonial marriage and the child is born during the marriage, or within 300 days after its termination, even though the marriage turns out to be invalid, or (2) where the child's parents marry or attempt to marry after the child's birth, and the father has acknowledged paternity in a writing filed with the registrar of vital statistics or with a local board of health.²⁶⁶ If no presumption arises from an attempted marriage, then a man still is presumed to be the father if, with the consent of the mother, he *either* (1) receives the child into his home and openly acknowledges paternity, or (2) acknowledges paternity in writing with the registrar of vital statistics or a local board of health.²⁶⁷

The Indiana statute no longer assumes that the child always will remain with the mother. Under the new statute, the court is empowered not only to issue support orders once paternity is established, but also to determine custody and visitation rights.²⁶⁸ The statute contains provisions for the determination of custody and support which roughly parallel the provisions of the Indiana Dissolution of Marriage Act²⁶⁹ but with some interesting changes and omissions. For example, the court has greater power to limit the custodial parent's authority and to modify existing custody rights in a paternity action than it does in a dissolution or custody action.²⁷⁰ The court also has broader powers to modify visitation orders and support orders in a paternity action.²⁷¹

The new statute removes the quasi-criminal provisions which remained in the previous statute. The putative father no longer has a

²⁶⁶*Id.* § 31-6-6.1-9(a) (Supp. 1979). It remains to be seen whether this presumption will be given the same weight as the common law presumption involved in *L.F.R. v. R.A.R.*, 378 N.E.2d 855 (Ind. 1978).

²⁶⁷IND. CODE § 31-6-6.1-9(b) (Supp. 1979).

²⁶⁸*Id.* § 31-6-6.1-10(a).

²⁶⁹*Compare id.* §§ 31-6-6.1-11 to -16 (Supp. 1979) *with id.* §§ 31-1-11.5-21, -22(d), -24, -12, -17(a) -15, -14, -13 (1976).

²⁷⁰Under the dissolution statute, a court can limit the custodial parent's authority to determine the child's upbringing only if it finds that the child's physical or emotional health would otherwise be endangered and can modify a custody order only upon a showing of "changed circumstances so substantial and continuing as to make the existing custody order unreasonable." *Id.* §§ 31-1-11.5-21(b), -22(b) (1976). Under the paternity statute, the standard for either is the "best interests of the child." *Id.* §§ 31-6-6.1-11(b), (e) (Supp. 1979). A court may interview the child in chambers under either statute, but in a dissolution action, the court "may" allow counsel to be present and "may" make a record. In a paternity action, the court "shall" permit counsel to be present at the interview, "which must be on the record." *Compare id.* § 31-1-11.5-21(d) (1976), *with id.* § 31-6-6.1-11(d) (Supp. 1979).

²⁷¹*Compare id.* §§ 31-6-6.1-12(b), -13(f) (Supp. 1979), *with id.* §§ 31-1-11.5-24(b), -17(a) (1976).

right to remain silent,²⁷² and all references to punishment by contempt have been removed.²⁷³ In this respect, the legislature may have gone too far because child support orders issued under the dissolution statute remain enforceable by contempt under section 17(a) of the dissolution act.²⁷⁴ In transferring the various provisions of the dissolution act into the new paternity statute, however, this portion of section 17(a) was omitted. Other means of enforcement, including assignment of wages,²⁷⁵ are provided, but in some cases the threat of enforcement by contempt is the only effective means of securing compliance with a child support order. When the obligor parent changes jobs frequently or is self-employed, so that there are no wages to assign, and there is no property to attach, support orders issued under the new paternity statute may be impossible to enforce unless the courts rely on their inherent power to enforce support orders by contempt.²⁷⁶

²⁷²*Id.* § 31-6-3-3 (Supp. 1978) (repealed effective October 1, 1979).

²⁷³The 1979 amendment deleted all references to punishment for contempt of a support order entered in a paternity action. *Id.* § 31-6-7-15 (Supp. 1979).

²⁷⁴*Id.* § 31-1-11.5-17(a) (1976). The relevant portion provides: "Terms of the decree may be enforced by all remedies available for enforcement of a judgment including but not limited to contempt or an assignment of wages or salary."

²⁷⁵*Id.* § 31-6-6.1-16(e) (Supp. 1979).

²⁷⁶Courts assumed the inherent power to enforce support orders by contempt long before the divorce statutes provided for it. *See, e.g., Corbridge v. Corbridge*, 230 Ind. 201, 102 N.E.2d 764 (1952).

IX. Evidence

HENRY C. KARLSON*

A. HEARSAY

1. *Statements Against Penal Interest.*—The appeal of a convicted murderer in *Taggart v. State*¹ was denied as the Indiana Supreme Court reaffirmed the general inadmissibility of a hearsay statement against penal interest offered to exculpate a defendant in a criminal trial.² Evidence of this nature is admissible under *Taggart* only when its exclusion would violate the due process clause of the fourteenth amendment of the United States Constitution.³ In *Taggart*, a third party, William McCall, had allegedly confessed to the murders. At a motion in limine hearing, the prosecution had obtained an order preventing the defense from offering any evidence concerning the alleged confession. The defendant offered to prove that the confession was typed by the defendant's son-in-law from an original provided by King Smith. Smith allegedly promised that McCall would sign the confession for \$5,000 but would deny it if not paid.

The *Taggart* court is clearly correct in holding that exclusion of the alleged confession did not violate due process⁴ in light of the Supreme Court decision of *Chambers v. Mississippi*.⁵ *Chambers* was the first Supreme Court opinion to hold that the exclusion of a statement against penal interest may be a violation of due process. In *Chambers*, the defense sought to use statements made by the witness McDonald. When McDonald denied committing the crime charged against the defendant, the defense sought to offer evidence that McDonald had admitted on several occasions that he had committed the crime. He even had confessed to the defense counsel and then repudiated his confession. Moreover, an alibi offered by

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¹382 N.E.2d 916 (Ind. 1978).

²*Id.* at 918. Statements against penal interest have traditionally been held inadmissible in Indiana. See *Siple v. State*, 154 Ind. 647, 57 N.E. 544 (1900); *McGraw v. Horn*, 134 Ind. App. 645, 183 N.E.2d 206 (1962).

³382 N.E.2d at 918.

⁴*Id.* at 917-18.

⁵410 U.S. 284, 302 (1973). Prior to *Chambers*, the only United States Supreme Court decision to directly consider the issue of a hearsay exception for statements against interest was *Donnelly v. United States*, 228 U.S. 243 (1913). In that opinion, with Justice Holmes dissenting, the Court held that the hearsay exception is limited to interests of a pecuniary or proprietary nature. *Accord*, *Scolari v. United States*, 406 F.2d 563 (9th Cir.), *cert. denied*, 395 U.S. 981 (1969).

McDonald was shown to be false, and evidence placed him near the scene of the crime. Due to Mississippi's voucher rule,⁶ the defense was not permitted to question McDonald concerning the prior statements. The hearsay rule prevented witnesses who had heard McDonald's prior confessions from relating them to the jury. The Supreme Court, therefore, concluded that exclusion of McDonald's statements violated the defendant's due process because the statements against penal interest possessed substantial guarantees of reliability in this case.⁷

Relying on *Chambers*, the Indiana Supreme Court in *Taggart* affirmed the trial court's exclusion of McCall's statements. In *Taggart*, unlike *Chambers*, no evidence was offered tying McCall to the murders other than the alleged confession. Assuming that McCall had in fact made the confession, it is difficult to determine that the statement was against his interest because he expected to receive \$5,000.⁸ The supreme court concluded that the evidence lacked any guarantee of reliability.⁹

As the *Taggart* court correctly found, exclusion of a statement against penal interest that was made in an attempt to further the declarant's financial interest does not violate due process because such evidence does not possess any assurance of trustworthiness.¹⁰ Resolution of the constitutionality of excluding the evidence offered by the defense in *Taggart*, however, does not foreclose consideration of the propriety of excluding statements against penal interest as hearsay, while admitting statements against proprietary or pecuniary interest as an exception to the hearsay rule.

Federal Rule of Evidence 804(b)(3) would prohibit the use of a statement against penal interest offered to exculpate an accused

⁶Mississippi's party witness or voucher rule prohibits a party from cross-examining or impeaching his own witness. *Clark v. Lansford*, 191 So. 2d 123, 125 (Miss. 1966). Thus, *Chambers* was prevented from calling witnesses to discredit the reputation of McDonald, whom he had called as his own witness. Prior to trial, he had unsuccessfully attempted to have McDonald ruled a hostile witness. 410 U.S. at 295-98.

⁷410 U.S. at 302-03.

⁸Consider, however, Justice Holmes' dissent in *Donnelly v. United States*, 228 U.S. 243 (1913):

The exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man . . . and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight.

Id. at 278 (Holmes, J., dissenting).

⁹382 N.E.2d at 919.

¹⁰*Id.*

“unless corroborating circumstances clearly indicate the trustworthiness of the statement.”¹¹ This standard of admissibility has been stringently applied by courts in a number of cases to exclude declarations against penal interest.¹² Congress added the requirement of corroboration due to the danger of a trumped-up confession by a professional criminal.¹³ The Florida Court of Appeals, in *Pitts v. State*,¹⁴ quoted in *Taggart*, summarized the dangers of such evidence:

“Although the rule announced may appear at first blush to be harsh it is, like the hearsay rule itself, the product of common sense. Were admissions of guilt made by a party unavailable at the trial to cross-examination, whether as a result of absence or refusal to testify, held to be admissible in evidence at the trial of an accused then a veritable daisy chain of extrajudicial ‘confessions’ would be the inevitable result. The case sub judice is an excellent example. Had the alleged statements of Adams, while he refused to take the stand as a witness and testify, been admitted into evidence and believed by the jury then appellants would have been acquitted, never again subject to jeopardy. Then upon Adams being tried for the crimes for which appellants would have been acquitted their confessions would have been admissible in the Adams’ trial, resulting, if believed by the jury, in acquittal. Under such circumstances, which are the logical result and not strained fantasy, three persons would be acquitted of the crimes notwithstanding that each volun-

¹¹FED. R. EVID. 804(b)(3) provides the following hearsay exception:

Statement against interest. A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

¹²See *United States v. Bagley*, 537 F.2d 162 (5th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977); *Lowery v. Maryland*, 401 F. Supp. 604 (D. Md. 1975), *aff’d mem.*, 532 F.2d 750 (4th Cir. 1976), *cert. denied*, 429 U.S. 919 (1976).

¹³The requirement of corroboration for statements against penal interest offered to exculpate an accused at a criminal trial was added at the suggestion of Senator McClellan. Congress elaborated upon his suggestion, noting the special dangers of a trumped-up confession by a professional criminal or some person with a strong motive to lie. 4 J. WEINSTEIN & M. BERGER, *WEINSTEIN’S EVIDENCE* ¶ 804(b)(3)[03], at 804-103 to -114 (1979) [hereinafter cited as J. WEINSTEIN].

¹⁴307 So. 2d 473 (Fla. Dist. Ct. App.), *cert. dismissed*, 423 U.S. 918 (1975), *quoted in* 382 N.E.2d at 918-19.

tarily confessed thereto. What, one asks rhetorically, happens to the public and the victims of crimes under such circumstances?"¹⁵

In only one respect is the Florida Court of Appeals incorrect. A jury would not have to believe an extrajudicial confession by a person unavailable for cross-examination to acquit him. Because of the heavy burden of proof put on the prosecution in a criminal trial, it would merely be necessary for the jury to be unsure of the confession's falsity.

In light of the real danger of abuse, the Indiana Supreme Court in *Taggart* was correct in generally excluding statements against penal interest offered by a defendant in a criminal trial. However, the dangers that exist in criminal trials for evidence of this nature are not found in civil trials. If given the opportunity to consider the admissibility of a statement against penal interest offered as an exception to the hearsay rule at a civil trial, the Indiana Supreme Court should consider adopting a rule similar to Federal Rule of Evidence 804(b)(3), which would admit the evidence.¹⁶

2. *Statements for Purposes of Medical Treatment.*—Statements made to a treating physician concerning the cause of a physical illness were declared hearsay by the Indiana Supreme Court in *C.T.S. Corp. v. Schoulton*.¹⁷ Manley Robinson had died as a result of acute liver and kidney failure. In an action brought for workmen's compensation benefits by Philip Schoulton, the administrator of Robinson's estate, the Industrial Board determined that his death was the result of inhalation of toxic fumes in the course and scope of employment. The court of appeals rejected C.T.S. Corporation's appeal from the award granted by the Industrial Board.¹⁸ On appeal to the supreme court, the sole evidential issue was the existence of sufficient competent evidence to sustain

¹⁵382 N.E.2d at 918-19 (quoting 307 So. 2d at 486).

¹⁶Indiana is in the definite minority in its total rejection of statements against penal interest. See *People v. Spriggs*, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964) (en banc); *State v. Larsen*, 91 Idaho 42, 415 P.2d 685 (1966); *People v. Lettrich*, 413 Ill. 172, 108 N.E.2d 488 (1952); *In re Forsythe's Estate*, 221 Minn. 303, 22 N.W.2d 19 (1946); *Osborne v. Purdome*, 250 S.W.2d 159 (Mo. 1952) (en banc); *Sutter v. Easterly*, 354 Mo. 282, 189 S.W.2d 284 (1945); *More v. Metropolitan Life Ins. Co.*, 237 S.W.2d 210 (Mo. Ct. App. 1951); *Blocker v. State*, 55 Tex. Crim. 30, 114 S.W. 814 (1908); *Newberry v. Commonwealth*, 191 Va. 445, 61 S.E.2d 318 (1950); MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 218, at 673 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]; Annot., 92 A.L.R.3d 1164 (1979).

¹⁷383 N.E.2d 293 (Ind. 1978). For further discussion of this case, see Arthur, *Workmen's Compensation, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 439, 447-55 (1980); Greenberg, *Administrative Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 39, 42-45 (1980).

¹⁸383 N.E.2d at 293-94.

the board's determination in light of the "residuum rule."¹⁹ Evidence of causation consisted solely of testimony from Robinson's treating physician.

After Robinson had complained of nausea, vomiting, and general weakness, he was hospitalized. Within a week he died as a result of kidney and liver failure. His treating physician testified that he had been asked by the decedent's sister-in-law whether his condition could have been caused by exposure to cleaning solvent. The inquiry prompted him to question Robinson, who stated in response that "he had tripped over a barrel or bucket of cleaning solvent and that it spilled all over the floor and that he got down and cleaned it up."²⁰ Proper objection to this testimony was made at the hearing.²¹

In accord with prior Indiana decisions, the supreme court held that medical history may form the basis of a medical opinion testified to at a trial; however, the history is hearsay if offered to prove facts asserted therein.²² The *C.T.S.* court specifically rejected a rule adopted by the second district court of appeals which permitted the use of hearsay not falling within a traditionally recognized exception when a "circumstantial probability of trustworthiness" and a need for the evidence ex-

¹⁹Indiana's residuum rule provides that it is improper but not reversible error for the board to admit incompetent hearsay evidence; however, an award must be supported by some competent evidence presented at the hearing. See *Bohn Aluminum & Brass Co. v. Kinney*, 161 Ind. App. 128, 314 N.E.2d 780 (1974); *Robinson v. Twigg Indus. Inc.*, 154 Ind. App. 339, 289 N.E.2d 733 (1972); *Asbestos Insulating & Roofing Co. v. Schrock*, 114 Ind. App. 177, 51 N.E.2d 395 (1943), *overruled*, *American Security Co. v. Minard*, 118 Ind. App. 310, 77 N.E.2d 762 (1948); *White Swan Laundry v. Muzolf*, 111 Ind. App. 691, 42 N.E.2d 391 (1942).

²⁰*C.T.S. Corp. v. Schoulton*, 354 N.E.2d 324, 330 (Ind. Ct. App. 1976), *rev'd*, 383 N.E.2d 293 (Ind. 1978).

²¹If proper objection is not made to hearsay, it may form the basis of an award or court decision. One Indiana court has explained:

Hearsay evidence is not inherently unreliable. Rather, as Professor Wigmore suggests, it is technically incompetent and therefore excludable because generally "such statements lack the trustworthiness that the test of cross-examination might supply." But where no objection to such testimony is made at trial, the trier of fact and the reviewing court may afford to such evidence the probative effect afforded to otherwise competent evidence of similar import.

Turentine v. State, 384 N.E.2d 1119, 1121-22 (Ind. Ct. App. 1979) (citations omitted). The supreme court in *C.T.S.* stated: "But if not objected to, the hearsay (incompetent evidence) may form the basis for an award." 383 N.E.2d at 296 (quoting 354 N.E.2d at 332 (Buchanan, J., dissenting)).

²²383 N.E.2d at 294 (citing *City of Anderson v. Borton*, 132 Ind. App. 684, 178 N.E.2d 904 (1962)). The court in *Durham Mfg. Co. v. Hutchins*, 115 Ind. App. 479, 58 N.E.2d 444 (1945) held: "Physicians are permitted to testify as to statements made to them by one who makes them for the purpose of securing diagnosis and treatment; not to establish the truth of the statements made, but to show the basis of the doctor's opinion." *Id.* at 483, 58 N.E.2d at 446.

isted.²³ The supreme court made no mention of the segment of the dissenting opinion in the court of appeals decision in *C.T.S.* which noted that the evidence offered did fall within a hearsay exception recognized by many state and all federal courts.²⁴ The supreme court's adherence to prior Indiana precedent and rejection of highly trustworthy evidence as substantive evidence was incorrect.

Evidence offered on behalf of the decedent's estate would have been admissible as an exception to the hearsay rule if offered in a federal court. Federal Rule of Evidence 803(4)²⁵ permits the use of statements made for medical diagnosis or treatment as substantive evidence. In order to be admissible, the statement must be "reasonably pertinent to diagnosis or treatment."²⁶ Robinson had an incentive to provide a truthful answer to the physician's questions about the cause of his deteriorating health if he desired to continue living. The doctor's discovery of the nature of the poison and its possible antidote depended on ascertainment of the poison's source. Although causation insofar as it relates to the location where an injury took place is usually unnecessary for treatment, it was an imperative requirement for the treatment of Robinson. The rationale for receiving testimony of this nature was expressed by Judge Learned Hand in *Meaney v. United States*:²⁷

A man goes to his physician expecting to recount all that he feels, and often he has with some care searched his consciousness to be sure he will leave out nothing. If his narrative of present symptoms is to be received as evidence of the facts, as distinguished from mere support for the physician's opinion, these parts of it can only rest upon his motive to disclose the truth because his treatment will in part depend upon what he says. . . .

²³American United Life Ins. Co. v. Peffley, 158 Ind. App. 29, 301 N.E.2d 651 (1973) (cited with approval in M. SEIDMAN, THE LAW OF EVIDENCE IN INDIANA 140 (1977)).

²⁴354 N.E.2d at 331 (Buchanan, J., dissenting). The failure to mention this part of the dissenting opinion is surprising because the supreme court specifically adopted the dissenting opinion insofar as it rejected the use of hearsay evidence in violation of the residuum rule. 383 N.E.2d at 296.

²⁵FED. R. EVID. 803(4) provides the following hearsay exception: "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Advisory Committee notes to this section cite *Shell Oil Co. v. Industrial Comm'n*, 2 Ill. 2d 590, 119 N.E.2d 224 (1954), MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 266, at 564 (1st ed. 1954), as evidence of a modern trend to admit statements of causation pertinent to treatment. 4 J. WEINSTEIN, *supra* note 13, ¶ 803(4)[01], at 803-125 to -132 (1979).

²⁶FED. R. EVID. 803(4).

²⁷112 F.2d 538 (2d Cir. 1940).

The same reasoning applies with exactly the same force to a narrative of past symptoms. . . . A patient has an equal motive to speak the truth; what he has felt in the past is as apt to be important in his treatment as what he feels at the moment.²⁸

Judge Hand's opinion, although dealing with the admissibility of a statement of past symptoms, supports with equal force the admissibility of a statement of causation necessary for treatment. An individual rarely lies when his physical well-being is at stake.

Current Indiana law treats statements of presently existing bodily condition made by a patient to his physician as an exception to the hearsay rule.²⁹ As noted by Judge Hand, to admit evidence of this nature while excluding medical history is illogical. In each circumstance, the reliability and admissibility is premised upon a person's desire to receive effective medical treatment. Although the various states disagree about a rule requiring the exclusion of statements of medical history relating to cause,³⁰ the better position appears to be that statements of this nature are admissible if they were reasonably needed for diagnosis or treatment.³¹

The C.T.S. court's specific rejection of evidence not falling within a traditionally recognized exception but showing "a circumstantial probability of trustworthiness and a necessity for the evidence"³² must also be considered. Use of evidence meeting these requirements was first permitted in Indiana courts by the second district court of appeals in *American United Life Insurance Co. v. Peffley*.³³ *American Life* was consistent with the trend among federal and state courts allowing the fact finder to consider all reliable evidence.³⁴ Federal Rules of Evidence 803(24) and 804(5) em-

²⁸*Id.* at 539-40.

²⁹*Indiana Union Traction Co. v. Jacobs*, 167 Ind. 85, 78 N.E. 325 (1906); *Haste v. Radio Corp. of America*, 146 Ind. App. 528, 257 N.E.2d 313 (1970).

³⁰*See Jensen v. Elgin, Joliet & E. Ry.*, 24 Ill. 2d 383, 182 N.E.2d 211 (1962); *Board of Comm'rs v. Leggett*, 115 Ind. 544, 18 N.E. 53 (1888); *Goldstein v. Sklar*, 216 A.2d 298 (Me. 1966); Note, *Evidence—Admissibility of Expressions of Pain and Suffering*, 51 MICH. L. REV. 902 (1953); Annot., 37 A.L.R.3d 788, 802-16 (1971). A majority of jurisdictions require the exclusion of any statement dealing with cause. MCCORMICK, *supra* note 16, § 292, at 690-91.

³¹*See Shell Oil Co. v. Industrial Comm'n*, 2 Ill. 2d 590, 119 N.E.2d 224 (1954); MCCORMICK, *supra* note 16, § 292, at 691; M. SEIDMAN, *supra* note 23, at 130-31.

³²383 N.E.2d at 295 (quoting *American United Life Ins. Co. v. Peffley*, 158 Ind. App. 29, 41, 301 N.E.2d 651, 658 (1973)).

³³158 Ind. App. 29, 301 N.E.2d 651 (1973).

³⁴Professor Seidman in his text on Indiana evidence wrote:

Fortunately, the existing exceptions to the hearsay rule have not been frozen in place for all time either in Indiana or in the federal courts. The prior exceptions arose when the trial judges perceived that the offered evidence was not then within a recognized exception to the rule, yet it had a circumstantial

body this principle. Both rules permit the use of statements not falling within specifically enumerated exceptions when

- (A) the statement is offered as evidence of a material fact;
- (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.³⁵

It is clear that evidence which will be rejected in future Indiana cases in conformity with *C.T.S.* would be admitted in federal courts. This may cause attorneys to select a forum for their civil actions based upon considerations of evidence admissibility. It will serve to increase forum shopping and in some cases make the outcome depend on the fortuity of federal jurisdiction. Absent strong policy interests which did not exist in *C.T.S.* in maintaining a specific rule of evidence, rules of evidence in both state and federal courts should be similar. When the state rule of evidence is without logical support, the federal rule should be adopted.

3. *Former Testimony.*—Former testimony as an exception to the hearsay rule was the subject of two recent Indiana Supreme Court opinions that indicate Indiana's treatment of the exception is consistent with Federal Rule of Evidence 804(b)(1).³⁶ Basic requirements for the exception were well illustrated in *Kimble v. State*.³⁷ The defendant's first trial in *Kimble* for the burglary and murder of two elderly women ended in a mistrial. At the defendant's retrial on the same charges, a witness who had testified

probability of trustworthiness and there was a necessity for its use in the circumstances of the present case. If these two criteria exist today, then a further exception in a particular case should be granted because the reason for the rule has been satisfied.

M. SEIDMAN, *supra* note 23, at 140. See *Dalis County v. Commercial Union Ass'n*, 286 F.2d 388 (5th Cir. 1961); *United States v. Barbati*, 284 F. Supp. 409 (E.D.N.Y. 1968). As to Indiana, Professor Seidman's jubilation was premature in light of *C.T.S.*

³⁵FED. R. EVID. 803(24), 804(5).

³⁶FED. R. EVID. 804(b)(1) provides that "if the declarant is unavailable as a witness," then the court may use testimony that the declarant gave at another proceeding, provided the party taking the testimony had a "motive and interest similar to those of the party" now seeking to introduce the former testimony.

³⁷387 N.E.2d 64 (Ind. 1979). The former testimony exceptions require that the party against whom the statement is offered or his successor in interest had an opportunity and similar motive to cross-examine the declarant and that the declarant must be unavailable for trial. *Henderson v. State*, 259 Ind. 248, 286 N.E.2d 398 (1972); *Deep Vein Coal Co. v. Dowdle*, 224 Ind. 244, 66 N.E.2d 598 (1946); *Levi v. State*, 182 Ind. 188, 104 N.E. 765 (1914); FED. R. EVID. 804(b)(1); MCCORMICK, *supra* note 16, § 255, at 616-17; M. SEIDMAN, *supra* note 23, at 115-18; 4 J. WEINSTEIN, *supra* note 13, ¶ 804(b)(1)[04], at 804-65 to -72.

at the first trial was determined to be unavailable.³⁸ After the prosecution showed an extensive good faith effort to discover the whereabouts of the missing witness,³⁹ a transcript of the witness' testimony was read into the record at the second trial.⁴⁰ On appeal, the Indiana Supreme Court properly rejected the defendant's allegation of error predicated upon the receipt of this evidence.⁴¹

Unlike other hearsay exceptions, former testimony does not rely upon circumstances to provide the guarantees of trustworthiness usually furnished by cross-examination and oath. Both oath and the opportunity to cross-examine were present. Former testimony differs from other testimony only in the absence of the trier of fact at the time testimony is taken. Because of the importance of demeanor evidence, which is available only if the witness is before the trier of fact, former testimony as an exception to the hearsay rule is limited to situations in which the witness is unavailable.⁴² At criminal trials,

³⁸387 N.E.2d at 65-66.

³⁹A comprehensive effort was made to determine the whereabouts of the witness Summers:

(1) Summers had been subpoenaed through the sheriff and the United States mail and had not been available for process; (2) her last known residence was checked; (3) her mother was contacted and did not know her whereabouts; (4) Christopher Petty, her boyfriend, stated that he had not seen her in six months; (5) registration in adult educational courses in Marion County was checked; (6) the city directory, the criss-cross directory, the telephone directory, and a canvassing of the neighborhood and potential places of employment did not reveal her; (7) the post office stated that Summers had left no forwarding address; (8) all the utility companies were called and there was no account for Donna Summers or D. Summers; (9) Summers had never obtained an operator's permit and had no car and no plates and was not listed with the Bureau of Motor Vehicles; (10) the Social Security Administration advised the investigator that Summers was not employed; (11) a check with the police department records reveal[ed] that . . . Summers was not and had not been a defendant in any cause but had been a victim; (12) leads from the county welfare and township trustee's office led investigators to an address on College, and at least a dozen unsuccessful attempts were made to ascertain whether Summers was there; (13) the Drug Enforcement Administration informed the investigators that Summers was not on record with them; and (14) although it was discovered that welfare checks were being sent to the College address (also Summers's mother's address), ostensibly for the witness who has a small child, Summers's mother's name is also Donna Summers.

Id.

⁴⁰*Id.*

⁴¹*Id.*

⁴²Professor Seidman in his work on Indiana evidence states:

Technically it is hearsay only because of the lack of the personal presence of the witness at the present trial so that the jurors may observe his demeanor. Since there is a strong policy favoring the personal presence of the witness for demeanor evaluation, in order for his former testimony to be received, it is necessary to demonstrate to the trial judge the unavailability of the witness

M. SEIDMAN, *supra* note 23, at 115-16.

former testimony evidence offered against a defendant violates his sixth amendment right of confrontation, unless the witness is actually unavailable.⁴³ In *Kimble*, the court properly received the witness' prior testimony because she was unavailable by any criteria for the retrial, but had been available for cross-examination by the defendant at the previous mistrial.⁴⁴

The use of prior testimony in *Kimble* should be contrasted with its rejection in *Bryant v. State*.⁴⁵ In *Bryant*, the supreme court held that a transcript offered by the defendant of his extradition hearing was properly rejected.⁴⁶ The defendant's theory on appeal was that his prior self-serving statement was admissible as prior testimony because it had been given under oath and had been subject to cross-examination at the hearing. Because he elected not to testify, the defendant claimed that he was "constitutionally unavailable" and that use of the former testimony was impermissible.⁴⁷

The court's rejection of the defendant's alleged error was correct. Unavailability for purposes of the use of former testimony does not include those situations in which the party offering the evidence has procured the unavailability of the witness.⁴⁸ The *Bryant* court reasoned: "[The witness] had every right to decline to testify, but it cannot be said that he was unavailable simply because he could not be required to testify."⁴⁹ Necessity, which is the rationale for the exception, does not exist when the availability of the witness is within control of the proponent of the evidence.

Consideration of unavailability aside, the evidence was still properly rejected. The defendant's allegation that the offered former testimony had been subject to cross-examination was not alone sufficient to meet the requirements of admissibility. The common law, in order to ensure that the prior examination of the witness was as it would have been at trial if the witness were available, required identity of both issues and parties.⁵⁰ Although the parties in *Bryant* were the same at both the extradition hearing and the trial, the issues were not. At the extradition hearing, the subject of the inquiry was limited "to the issues of whether or not the defendant was the person sought."⁵¹ At the hearing, the State had no reason to

⁴³*Berger v. California*, 393 U.S. 314 (1969); *Barber v. Page*, 390 U.S. 719 (1968).

⁴⁴387 N.E.2d at 66.

⁴⁵385 N.E.2d 415 (Ind. 1979).

⁴⁶*Id.* at 419-20.

⁴⁷*Id.* at 420.

⁴⁸*See* FED. R. EVID. 804(a) which states: "A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement"

⁴⁹385 N.E.2d at 420.

⁵⁰*McCORMICK*, *supra* note 16, §§ 256-257, at 617-22.

⁵¹385 N.E.2d at 419. *See* *Taylor v. Smith*, 213 Ind. 640, 13 N.E.2d 954 (1938); *Lawrence v. King*, 203 Ind. 252, 180 N.E. 1 (1932).

cross-examine the defendant. Although the court did not require the strict common law rule of identity of issues and parties, it did require that a similar motive for cross-examination exist.⁵² According to the supreme court, a similar motive to cross-examine did not exist when the issues were as different as identity and guilt.⁵³ The use of the similar motive test brings Indiana in line with Federal Rule of Evidence 804(b)(1).

B. Cross-Examination

1. *The Indiana Rape Shield Statute.*—Indiana Code sections 35-1-32.5-1 to -4 generally prohibit the defendant in a prosecution for a sex crime from offering evidence of his alleged victim's past sexual conduct.⁵⁴ Only "evidence of the victim's or a witness's past sexual conduct with the defendant" or "evidence which in a specific instance of sexual activity shows that some other person than the defendant committed the act upon which the prosecution is founded" may be introduced.⁵⁵ Opinion and reputation evidence concerning a rape victim's past sexual activity is specifically prohibited. Although commonly referred to as a "rape shield law," it applies to other sex crimes⁵⁶ and is in accord with a modern trend to limit the admissibility of such evidence.⁵⁷ Statutes of this type are legislative determinations of legal relevancy because they hold that the prejudicial effect of evidence of a sex crime victim's prior sexual conduct generally outweighs the evidence's probative value. A blanket rule excluding evidence of a victim's prior sexual conduct, without regard to its actual probative value, however, should be held unconstitutional when the probative value is great.⁵⁸ In every case, a

⁵²385 N.E.2d at 419-20.

⁵³*Id.*

⁵⁴IND. CODE § 35-1-32.5-1 (Supp. 1979) provides:

In a prosecution for a sex crime as defined in [IND. CODE §] 35-42-4, evidence of the victim's past sexual conduct, evidence of the past sexual conduct of a witness other than the accused, opinion evidence of the victim's past sexual conduct, opinion evidence of the past sexual conduct of a witness other than the accused, reputation evidence of the victim's past sexual conduct, and reputation evidence of the past sexual conduct of a witness other than the accused may not be admitted, nor may reference be made to this evidence in the presence of the jury, except as provided in this chapter.

⁵⁵*Id.* § 35-1-32.5-2(b), (c).

⁵⁶The sex crimes referred to in the act are rape, *id.* § 35-42-4-1; unlawful deviate conduct, *id.* § 35-42-4-2; child molesting, *id.* § 35-42-4-3; and child exploitation, *id.* § 35-42-4-4.

⁵⁷See FED. R. EVID. 412; ROTHSTEIN, RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 104-06 (1978) (citing CAL. PENAL CODE § 1127d (West 1974); COLO. REV. STAT. § 18-3-407 (1973); FLA. STAT. ANN. § 794.022 (Supp. 1979); IOWA CODE ANN. § 813.2, R20 (1979); MICH. COMP. LAWS ANN. § 750.520 (1968); N.Y. LAW CRIM. PROC. (McKinney) § 60.42 (Supp. 1979); S.D. COMPILED LAWS ANN. § 23-44-16.1 (1967)).

⁵⁸See Clinton, *The Right to Present a Defense: An Emergent Constitutional*

court should make an individual determination of legal relevance.⁵⁹

In *Lagenour v. State*,⁶⁰ the Indiana Supreme Court had an opportunity to consider the constitutionality of the Indiana statute insofar as it limits the ability of a defendant to cross-examine his alleged victim and other witnesses. Prior to trial, the State in *Lagenour* had "sought and received an order prohibiting . . . [the defense] from examining the prosecuting witness and the other alleged victims" of the defendant's sexual assaults concerning prior sexual conduct.⁶¹ On appeal, the court upheld the order by relying not only on the statute but also on the trial court's "inherent discretionary power to exclude and admit evidence and to grant motions in limine."⁶² Reliance upon the inherent power of a trial court was necessary because the defendant was charged with both sexual and non-sexual offenses at the same trial. If the court did not exercise this inherent power, evidence of the alleged victim's prior sexual conduct could not be excluded under the rape shield statute if the evidence related to non-sexual charges against the accused.⁶³

As the court correctly perceived in *Lagenour*, the only constitutional issue on appeal was whether the trial court's order prevented the defendant from conducting a full and free cross-examination.⁶⁴ The appellant's only allegation of harm was that the limitation deprived him of "reasonable latitude in effectively cross-examining the witness . . . in eliciting facts concerning their prior sexual conduct for the purposes of revealing their reputations for veracity, possible biases, prejudices or ulterior motives."⁶⁵ The court found this general claim of prejudice to be insufficient to sustain the appellant's claim that the ruling prevented effective cross-examination.⁶⁶

Guarantee in Criminal Trials, 9 IND. L. REV. 711 (1976); Note, *Indiana's Rape Shield Law: Conflict with the Confrontation Clause?*, 9 IND. L. REV. 418 (1976); Comment, *Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska*, 73 MICH. L. REV. 1465 (1976).

⁵⁹FED. R. EVID. 412 provides that evidence is admissible in circumstances not specifically mentioned in the rule if it "is constitutionally required to be admitted." It has been suggested that this limitation may be read into the Indiana rape shield statute to prevent the entire statute from being held unconstitutional. See Note, *Indiana's Rape Shield Law: Conflict with the Confrontation Clause?*, *supra* note 58, at 440.

⁶⁰376 N.E.2d 475 (Ind. 1978).

⁶¹*Id.* at 478.

⁶²*Id.* at 479 (emphasis omitted).

⁶³*Id.*

⁶⁴The appellant made no attempt to offer affirmative evidence of the prior sexual history or reputation of the state witnesses. *Id.*

⁶⁵*Id.*

⁶⁶*Id.*

In light of prior Indiana law, this part of the opinion must be considered incorrect. As early as 1883, in *Wood v. State*,⁶⁷ the supreme court wrote: "In order to avail himself of a ruling denying a right to ask a question, the party by whom the witness is produced must state what he expects to prove. The rule, however, is otherwise on cross-examination. In the latter case the cross-examining party is not required to make such a statement."⁶⁸ If an offer of proof is made on cross-examination, it may be ordered stricken on the rationale that the cross-examiner cannot know what the witness will answer.⁶⁹ Because it was impossible under Indiana law for the defense in *Lagenour* to make an offer of proof,⁷⁰ it becomes difficult to determine the method whereby a defendant may show "an actual impingement upon cross-examination," as required in the opinion.⁷¹

The only guidance to counsel in future cases is contained in the court's statement:

There is no suggestion made of the existence of any line of questioning related to any of the witnesses which could have been followed in the absence of the limitation. There is no suggestion made that any of the witnesses might have an attitude or inclination which could be the product of prior sexual conduct.⁷²

If this requirement may be met by merely reading into the record questions (a line of questioning) that would be asked absent the limitation, the holding in *Lagenour* becomes one of form over substance. Assuming that this would be insufficient, the court should have clearly stated what would be sufficient to preserve the question on appeal.

A more comprehensive attack on the rape shield statute was rejected by the Indiana Court of Appeals in *Finney v. State*.⁷³ The defendant in *Finney* first alleged that the statute infringed upon his right to attack the credibility of the prosecutrix through her prior sexual conduct. On the authority of *Lagenour* and *Borosh v. State*,⁷⁴

⁶⁷92 Ind. 269 (1883).

⁶⁸*Id.* at 273.

⁶⁹*Walker v. State*, 255 Ind. 65, 68, 262 N.E.2d 641, 643 (1970), *overruled on other grounds*, *Hardin v. State*, 265 Ind. 635, 358 N.E.2d 134 (1976).

⁷⁰The *Lagenour* court, in fact, stated that Indiana law prevents the cross-examining counsel from making an offer of proof. 376 N.E.2d at 479.

⁷¹*Id.*

⁷²*Id.*

⁷³385 N.E.2d 477 (Ind. Ct. App. 1979).

⁷⁴336 N.E.2d 409 (Ind. Ct. App. 1975). The court held:

Thus it is clear that only a total denial of access to such an area of cross-examination presents a constitutional issue. Any lesser curtailment of cross-

the court found that this general allegation was insufficient to demonstrate trial court error.⁷⁵ The court noted that the defendant could have impeached the prosecutrix on other grounds, such as prior convictions, and reputation for truth and veracity.⁷⁶ The court, in effect, held that only a total denial of cross-examination on credibility issues constitutes an impingement of cross-examination.⁷⁷

A second claim of constitutional error was made by the defendant. Specifically, the defendant alleged that the rape shield statute violated the equal protection clause of the fourteenth amendment by discriminating against rape defendants.⁷⁸ The claim was based on the fact that limitations on the type of character evidence introduced at trial occur only in sex cases. Finding that rape defendants are not a suspect classification, the court held that the classification bore a fair relationship to the purpose of the statute.⁷⁹

The defendant also attacked the rape shield statute by alleging that it was an ex post facto law.⁸⁰ His allegation was that the statute "introduced a new rule of evidence which made it easier to convict him."⁸¹ As correctly noted by the court, "the inquiry turns on

examination by the trial court is viewed as a regulation of the scope of such examination, and such curtailment is reviewable only for an abuse of discretion.

Id. at 412-13.

⁷⁵385 N.E.2d at 480.

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*Id.* See U.S. CONST. amend. XIV

⁷⁹385 N.E.2d at 480. Because rape defendants are not a suspect classification, the equal protection clause only demands that a rational basis exist for the classification and that the classification have a reasonable relationship to the purpose of the statute. *Geyer v. City of Logansport*, 370 N.E.2d 333 (Ind. Ct. App. 1977). See *Marshall v. United States*, 414 U.S. 417 (1974). The rape shield statute is a proper attempt by the legislature to protect the prosecuting witnesses at sex crime trials from harassment that might arise if their prior sex life were disclosed in court. *Roberts v. State*, 373 N.E.2d 1103 (Ind. 1978). The *Finney* court also held that the rape shield statute helps crime prevention because the victim will be "encouraged to report rape offenses" if evidence of embarrassing sexual activity is not admitted. 385 N.E.2d at 480.

⁸⁰385 N.E.2d at 480. The United States Supreme Court has defined an ex post facto law as follows:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

⁸¹385 N.E.2d at 480.

whether the statute changed a 'substantial right' or 'mere procedure.'"⁸² In 1882, the Indiana Supreme Court held that "a new statute permitting the use of general moral character evidence to impeach a witness was not an ex post facto law."⁸³ The court in 1882 reasoned that the statute provided a rule of procedure "applicable to trials for offenses committed before and after its passage."⁸⁴ Accepting the determination that permitting use of character evidence would not be ex post facto, the *Finney* court found that denial of the use of a particular type of character evidence did not violate the ex post facto clause.⁸⁵

2. *Psychiatric Witnesses*.—A defendant's pleading of insanity as a defense to a charge of robbery opened the door to evidence not otherwise admissible in *France v. State*.⁸⁶ Prior to trial, the defendant at a motion in limine hearing obtained an order from the trial court precluding the State from mentioning "any prior crimes or criminal records of the defendant."⁸⁷ The motion characterized evidence of prior crimes as "immaterial, irrelevant and highly prejudicial."⁸⁸ During cross-examination of two defense psychiatric witnesses, the prosecution over defense objection asked whether they had considered the defendant's criminal record in formulating their diagnoses. The prior crimes involved convictions for robbery, bank robbery, and passing a bad check, and covered a period from 1961 to 1972.⁸⁹

In determining that the evidence of prior crimes was properly before the court, the court noted that "it is well settled that a plea of not guilty by reason of insanity opens the door for evidence of past behavior, including prior criminal conduct."⁹⁰ The court stated further that "once a plea of insanity is offered by a defendant, all relevant evidence is admissible."⁹¹ In *France*, the State properly

⁸²*Id.* (citing *Warner v. State*, 265 Ind. 262, 354 N.E.2d 178 (1976)).

⁸³385 N.E.2d at 480 (citing *Robinson v. State*, 84 Ind. 452 (1882) (emphasis omitted)).

⁸⁴*Id.* at 453.

⁸⁵385 N.E.2d at 480-81. The court's determination of this issue is in accord with prior law. It is settled law that statutory changes in the rules of evidence which do not deprive an accused of a legitimate defense and which operate only in a limited manner to his disadvantage are not in violation of the ex post facto clause. *Beazell v. Ohio*, 269 U.S. 167 (1925). See *Thompson v. Utah*, 170 U.S. 43 (1898); *Gillioz v. Kincannon*, 213 Ark. 1010, 214 S.W.2d 212 (1948); *Winston v. State*, 186 Ga. 573, 198 S.E. 667 (1938).

⁸⁶387 N.E.2d 66 (Ind. Ct. App. 1979).

⁸⁷*Id.* at 70.

⁸⁸*Id.*

⁸⁹*Id.* at 70-71.

⁹⁰*Id.* at 71.

⁹¹*Id.* (citing *Stevens v. State*, 265 Ind. 396, 354 N.E.2d 727 (1976); *Twomey v. State*, 256 Ind. 128, 267 N.E.2d 176 (1971)).

questioned the defense's psychiatric witnesses concerning the defendant's prior criminal conduct because it was relevant to the credibility of the witnesses' conclusions.⁹²

The court's opinion is clearly correct. Indiana law provides that a mental disease or defect for purposes of defending a criminal "does not include an abnormality manifested only by repeated unlawful or antisocial conduct."⁹³ Proper cross-examination of a defendant's psychiatric witnesses would include an inquiry as to the extent, if any, their diagnoses were based upon this forbidden criteria. Questions dealing with the criminal history of the defendant are also necessary to determine whether their opinions were based upon an adequate investigation of the accused. If defense psychiatrists are unaware of a defendant's prior criminal record, it would indicate that their opinions are based upon inadequate or incomplete information. A disclosure that they are unaware of the prior record would adversely affect the weight to be given their testimony. The *France* court aptly concluded that "although evidence of prior convictions may be prejudicial in certain circumstances [to a defendant], the State's interest in arriving at the truth will prevail where the evidence is relevant to a material issue."⁹⁴

C. Impeachment

1. *Prior Inconsistent Statements.*—The issue of whether a prior statement of opinion by a witness inconsistent with that he offers in court testimony may be used for impeachment was analyzed by the supreme court in *Inman v. State*.⁹⁵ At the defendant's trial for murder, he made two attempts to demonstrate that witnesses had made prior statements inconsistent with their testimony. The first attempt was made when a witness was asked on cross-examination whether she had ever told anyone her thoughts on the shooting. An objection to this question as conclusory and without foundation was sustained.⁹⁶ The *Inman* court found no error on the part of the trial judge because "[the witness] had not yet been asked, and never was asked, for her thoughts or opinion on any aspect of the case."⁹⁷ The court concluded that "there was no testimony to impeach and the question was irrelevant at the time."⁹⁸ Unless

⁹²Holt v. State, 382 N.E.2d 1002 (Ind. Ct. App. 1978); Whitten v. State, 263 Ind. 407, 333 N.E.2d 86 (1975).

⁹³IND. CODE § 35-41-3-6(b) (Supp. 1979).

⁹⁴387 N.E.2d at 71 (citing Powers v. State, 380 N.E.2d 598 (Ind. Ct. App. 1978)).

⁹⁵383 N.E.2d 820 (Ind. 1978).

⁹⁶*Id.* at 823.

⁹⁷*Id.*

⁹⁸*Id.*

statements of opinion are to be excluded when offered for impeachment, the court's holding is clearly wrong. Further questions could have disclosed that the witness had previously made statements of opinion inconsistent with her testimony. The court's treatment of this issue with a second witness indicates that the line of questioning was terminated because it dealt with prior inconsistent statements of opinion.

The second witness was asked on cross-examination whether she had ever told anyone that "she thought the shooting was an accident."⁹⁹ The trial court sustained the State's objection that the second witness' statement was hearsay.¹⁰⁰ On appeal, exclusion of the question was held to be proper because the question called for a conclusion on the part of the witness.¹⁰¹ This is, of course, not true. The question did not ask for the witness' opinion; it asked whether the witness had previously stated an opinion. It is therefore necessary to decide whether statements of opinion inconsistent with testimony given in court should be considered in determining the weight to be given a witness' testimony. An excellent analysis of this issue is contained in *McCormick's Handbook on the Law of Evidence*.¹⁰²

Moreover, when the out-of-court statement is not offered at all as evidence of the fact asserted, but only to show theasserter's inconsistency, the whole purpose of the opinion rule, to improve the objectivity and hence reliability of testimonial assertions is quite inapplicable. Hence, though many earlier decisions . . . and some later opinions, exclude impeaching statements in opinion form, the trend of holdings and the majority view is in accord with the commonsense notion that if a substantial inconsistency appears the form of the statement is immaterial.¹⁰³

The logic of this statement is unassailable and requires no further comment.

2. *Prior Convictions*.—What constitutes a conviction for purposes of impeachment was a question of first impression for the supreme court in *McDaniel v. State*.¹⁰⁴ The defendant, who had been

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.* (citing *Fletcher v. State*, 241 Ind. 409, 172 N.E.2d 853 (1961)).

¹⁰²McCORMICK, *supra* note 16.

¹⁰³*Id.*, § 35, at 69-70 (citations omitted).

¹⁰⁴375 N.E.2d 228 (Ind. 1978). Although a similar issue was before the court in *Johnson v. Samuels*, 186 Ind. 56, 114 N.E. 977 (1917), the jury verdict of guilty was set aside, and a new trial ordered before the verdict of guilty was offered for purposes of impeachment. *Id.* at 66-67, 114 N.E. at 980-81. For purposes of impeachment, only convictions for treason, murder, rape, arson, burglary, robbery, kidnapping, forgery, and

convicted of second degree murder, raised on appeal a claim of error predicated upon a motion in limine denied by the trial judge. Prior to trial, the defendant had moved to exclude evidence of his two prior pleas of guilty to charges of theft by check which the State had used for purposes of impeachment. In each case, final judgment and sentence had been withheld.¹⁰⁵ Because final judgment had not been entered, the defendant alleged that he had never been convicted of the crimes.¹⁰⁶ In upholding the ruling of the trial court, the supreme court cited *State v. Redman*,¹⁰⁷ wherein it was stated: "It is usually considered that there has been conviction of crime when there is a plea of guilty to a charge duly presented or a finding or verdict of guilty after trial, and that thereafter the presumption of innocence no longer follows the defendant."¹⁰⁸ This language in *Redman* was merely dicta; the *Redman* court had in fact entered a formal judgment and sentenced the respondent, who was in prison under that sentence at the time the opinion was written.¹⁰⁹ Notwithstanding the reliance on dicta, *McDaniel* correctly defined a conviction for purposes of impeachment.

Although a matter of first impression in Indiana, courts in other jurisdictions have had occasion to consider the issue. In *Commonwealth v. Reynolds*,¹¹⁰ a Kentucky court wrote:

[T]he word ["conviction"] admits of different interpretations and . . . it had a two-fold meaning: one is the determination of the fact of guilt, as by the verdict of a jury or by confession. The other denotes the final judgment in a prosecution when it is employed in speaking of a state of infamy. The truth of those observations will be impressed upon anyone who peruses the thirty-eight pages in Word and Phrases, Vol. 9A, which are devoted to cases in which this word had been defined. The word generally means the ascertainment of defendant's guilt by some legal mode and an adjudication that the accused is guilty. This may be accomplished by a confession by the accused in open court, a plea of guilty or a verdict which ascertains and publishes the fact of guilt. We believe in the majority of those cases and in the majority of jurisdictions (although we have not counted

willful and corrupt perjury, as well as crimes involving dishonesty or false statement, are admissible. *Ashton v. Anderson*, 258 Ind. 51, 279 N.E.2d 210 (1972).

¹⁰⁵375 N.E.2d at 230.

¹⁰⁶*Id.*

¹⁰⁷183 Ind. 332, 109 N.E. 184 (1915).

¹⁰⁸*Id.* at 342, 109 N.E. at 188.

¹⁰⁹*Id.* at 336, 109 N.E. at 186.

¹¹⁰365 S.W.2d 853 (Ky. 1963).

noses), the word "conviction" is not limited to a final judgment.¹¹¹

At least until a guilty plea has been withdrawn or a jury verdict set aside, such evidence of conviction is relevant as affecting a witness' credibility.

It has been suggested, however, by Judge Weinstein in his text on federal evidence that a distinction should be made between situations in which a jury verdict exists and those in which a plea of guilty has been entered.¹¹² A jury verdict is, in fact, a determination of guilt, based upon a consideration of evidence produced at an adversary proceeding. The possibility that a motion for a new trial might be granted is equivalent to a possibility of reversal on appeal, which by the majority rule does not prevent the use of a conviction for impeachment.¹¹³ When no jury verdict exists and a plea of guilty is before the court, Judge Weinstein reasons that the possibility always exists that the plea will be withdrawn.¹¹⁴

Upon analysis, it appears that jury verdicts and guilty pleas that have been accepted after a proper inquiry should not be treated differently. If the court has made a thorough inquiry into the providency of a guilty plea, the presumption of guilt is at least as strong as that of a jury verdict. The *McDaniel* court's observation that the defendant had made a judicial confession to the crimes in question indicates that the court made a complete inquiry into his guilty pleas.¹¹⁵ Withdrawal of a guilty plea after acceptance by the court is not a matter of right, and the possibility of a judge permitting withdrawal is not too different from the possibility of his granting a new trial after a jury verdict. At most, a defendant should be permitted to explain to the jury his reason for pleading guilty and to show that neither a formal finding of guilt nor any sentencing has been entered by the court. *McDaniel* is consistent with the modern trend among courts considering the question.¹¹⁶

D. Opening the Door

A recent Indiana Supreme Court decision demonstrates that otherwise inadmissible and prejudicial evidence may become admissible if necessary to rebut a misleading and incomplete picture

¹¹¹*Id.* at 854 (citing 9A WORDS AND PHRASES *Convicted; Convictions* 270-304 (1960)).

¹¹²3 J. WEINSTEIN, *supra* note 13, ¶ 609[06], at 609-89 (1978).

¹¹³*Id.* See FED. R. EVID. 609(e); Annot., 16 A.L.R.3d 726 (1967).

¹¹⁴3 J. WEINSTEIN, *supra* note 13, ¶ 609[06], at 609-89 (1978).

¹¹⁵375 N.E.2d at 230.

¹¹⁶See *United States v. Klein*, 560 F.2d 1236 (5th Cir. 1977); *United States v. Rose*, 526 F.2d 745 (8th Cir. 1975), *cert. denied*, 425 U.S. 905 (1976); *State v. Reyes*, 99 Ariz. 257, 408 P.2d 400 (1965); Annot., 14 A.L.R.3d 1272 (1967).

created by direct examination. In *Gilliam v. State*,¹¹⁷ the defendants were convicted of unlawful dealings in a Schedule I controlled substance.¹¹⁸ Prior to trial, the defendants at a motion in limine hearing obtained an order from the trial judge instructing the prosecutor "to make no reference in the presence of the jury to any separate offenses committed by" the defendants, unless admissible for impeachment.¹¹⁹ During direct examination of one of the defendants, the defense counsel elicited a detailed history of her heroin abuse and addiction.¹²⁰ The defendant also denied transferring the heroin as charged.¹²¹ The defendant testified that she had used heroin for two years prior to her arrest and that subsequent to her arrest she had successfully sought treatment for her addiction.¹²²

On cross-examination, the State asked the defendant, "'Have you been dealing in drugs for a long time, too?'"¹²³ In response, the defendant denied ever dealing in drugs.¹²⁴ In rebuttal to her testimony, the prosecution called a witness who, over defense objection, related making drug purchases from the defendant before the incident in question.¹²⁵ This cross-examination and rebuttal were cited as prejudicial errors in the appeal. The court correctly decided that these matters were not prejudicial errors.

At the time the pretrial motion in limine was made, it was properly granted by the trial court. Evidence of other criminal offenses committed by an accused is generally not admissible to prove commission of the crime under consideration.¹²⁶ In addition, Indiana law

¹¹⁷383 N.E.2d 297 (Ind. 1978).

¹¹⁸IND. CODE § 35-48-4-1 (Supp. 1979) provides that dealing in cocaine or a narcotic drug is a Class B felony if the amount is under three grams.

¹¹⁹383 N.E.2d at 300.

¹²⁰*Id.*

¹²¹The record contains the following direct examination:

Q. Alright. Now, you heard Mr. Schultz, Doug Schultz testify yesterday that when you came back to the house, you placed three tinfoil packets on the kitchen table?

A. That's—but, I never had—I know I have never did that.

Q. Alright. I wanta ask you. Did, except for the one tablet that your husband uh gave to you, did you have any heroin at all in your possession that day?

A. No, I didn't.

Id. at 300.

¹²²*Id.*

¹²³*Id.* at 301.

¹²⁴*Id.*

¹²⁵*Id.*

¹²⁶An exception to general inadmissibility is when the evidence tends to establish: "(1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proving of one tends to establish the other; (5) the identity of the person charged with the crime on trial." *Hergenrother v. State*, 215 Ind. 89, 92, 18 N.E.2d 784, 786 (1939). Evidence of entirely distinct and separate crimes, however, cannot be used to show a

provides that an accused may not be impeached by cross-examination or evidence concerning other criminal acts that did not result in a conviction,¹²⁷ thereby meeting the standards set out in *Ashton v. Anderson*¹²⁸ for impeaching credibility through prior convictions. However, at the time the motion was granted, the trial court was not aware of the nature of the evidence that would be presented by the defense.

The appellant's argument on appeal assumed, incorrectly, "that the granting of [a] motion *in limine* is a final determination of . . . inadmissibility."¹²⁹ On appeal, the correct issue was whether the cross-examination and evidence were proper and not whether they were embraced by the ruling on the pre-trial motion. Resolution of this question required a determination of whether evidence presented by the defendant had created an incomplete and misleading picture. The court reasoned:

In so casting this extended period of appellant's former life as involving only the illegal use of drugs, the defense sought to persuade the jury to infer that her involvement with drugs or the occasion charged was likewise so limited. As the basis for this salient inference appellants presented a misleading and incomplete picture of appellant Braxton's involvement with heroin¹³⁰

Logic dictates that an accused should not be permitted to create false and misleading inferences through the use of incomplete evidence.¹³¹ When evidence of an incomplete and misleading nature

disposition to commit the crime charged. *Zimmerman v. State*, 190 Ind. 537, 542, 130 N.E. 235, 237 (1921). See FED. R. EVID. 404(b).

¹²⁷When an accused testifies, the prosecution may cross-examine him to test his credibility; however, such an attack on credibility may not focus on particular "acts of misconduct other than prior convictions." *Shropshire v. State*, 258 Ind. 39, 44, 279 N.E.2d 225, 227 (1972). See *Jenkins v. State*, 372 N.E.2d 166 (Ind. 1978). But see FED. R. EVID. 608(b).

¹²⁸258 Ind. 51, 279 N.E.2d 210 (1972). For purposes of impeaching credibility of a witness, only convictions for certain crimes are admissible. See note 104 *supra*. See also *Fletcher v. State*, 264 Ind. 132, 340 N.E.2d 771 (1976); *Adams v. State*, 366 N.E.2d 692 (Ind. Ct. App. 1977).

¹²⁹383 N.E.2d at 301. Granting a motion in limine is not a final ruling upon the ultimate admissibility of evidence. The motion's purpose is to prevent the proponent of potentially prejudicial matter from displaying it to the jury or making statements about it before the jury until the trial court has ruled upon its admissibility in the context of the trial itself. *Lagenour v. State*, 376 N.E.2d 475 (Ind. 1978); *Baldwin v. Inter City Contractors Serv. Inc.*, 156 Ind. App. 497, 297 N.E.2d 831 (1973).

¹³⁰383 N.E.2d at 302.

¹³¹See *United States v. Cuadrado*, 413 F.2d 633 (2d Cir. 1969). Even when evidence is unlawfully obtained, it may become admissible if necessary to rebut perjurious testimony of the accused. *Walder v. United States*, 347 U.S. 62 (1954). In *Walder*,

is presented, the prosecution should be permitted to use otherwise inadmissible evidence to complete the mosaic only partially depicted by the defense. The *Gilliam* court correctly extracted the salient point from many prior opinions¹³² when it held that a defendant opens the door when he leaves "the trier of fact with a false or misleading impression of the facts related."¹³³

Justice Frankfurter wrote:

He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.

347 U.S. at 65. See *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971).

¹³²383 N.E.2d at 301 (citing *Randolph v. State*, 378 N.E.2d 828 (Ind. 1978); *Baker v. State*, 372 N.E.2d 1172 (Ind. 1978); *Pearish v. State*, 264 Ind. 339, 344 N.E.2d 296 (1976); *Martin v. State*, 261 Ind. 492, 306 N.E.2d 93 (1973); *Roby v. State*, 363 N.E.2d 1039 (Ind. Ct. App. 1977); *McDonald v. State*, 163 Ind. App. 667, 325 N.E.2d 862 (1975); *Hannah v. State*, 160 Ind. App. 317, 311 N.E.2d 838 (1974)).

¹³³383 N.E.2d at 301.

X. Insurance

*Arvid L. Mortensen**

Indiana insurance law was enriched during the survey period by four cases from Indiana's appellate courts and one case from the federal district courts. Of particular interest is the court of appeals decision that a fire insurance carrier may not apply an across-the-board deduction to the replacement value of direct property loss from fire simply because the cost to the insurer to make the insured whole is greater at the time of the loss than when the policy was initially issued. The Indiana Supreme Court determined that when each of two liability insurance policies written by different carriers was applicable to the same claim and when policy language met specific standards, each insurer was liable for a prorated contribution to the settlement above the deductible amount in the primary policy. A result was reached by the court of appeals which expanded the concept of direct loss when an insured was forced to sell cattle prematurely because of a loss to farm property from a tornado. Another court of appeals case puts attorneys on guard to certain construction contract language which, if used, limits the recourse of the insured despite negligence by the other party to the agreement. Finally, the federal district court discussed the legal interrelationships among life insurance premium payments, cash value, dividends, and the automatic premium loan provision in the context of a common business situation.

A. Replacement Value

In *Travelers Indemnity Co. v. Armstrong*,¹ the court of appeals, in affirming the jury verdict and decision of a trial court against the insurance company, determined that the term "actual cash value," when used in a fire insurance policy, meant the insured was entitled to a sufficient settlement to allow repair, restoration, or replacement of the damaged property without a deduction for depreciation.² The court further determined that punitive damages were allowable by the jury in addition to compensatory damages when

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¹384 N.E.2d 607 (Ind. Ct. App. 1979).

²*Id.* at 615.

the insurance company improperly represented the provisions of the insurance policy to the insured.³

Orrie L. Armstrong was the owner of a farmhouse, approximately 100 years old, which was extensively damaged by fire. Mrs. Armstrong and her husband, while occupying the home, had made several improvements, and after her husband's death, Mrs. Armstrong continued to maintain and modernize the house.⁴

In 1971, Mrs. Armstrong renewed a fire insurance policy through the Travelers Indemnity Company for a three-year period. Prior to the renewal, her agent advised that the coverage on the farmhouse be increased because the cost of building materials had risen substantially since the original issuance of the policy. Mrs. Armstrong acted on this advice and increased the policy limits on the farmhouse at renewal to \$15,000.

The day after the fire, which occurred in 1972, she notified her agent of the damage. A claims investigator for the insurance company and an independent repair contractor carefully examined the house to determine what would be necessary to restore the premises to their condition before the fire.

Within a week of this inspection, the insurance investigator telephoned Mrs. Armstrong and informed her that the cost of repair was \$8,729.62. He then offered to pay the insured \$4,200 in cash if she chose not to repair the house, or to pay \$6,400 to a contractor if she wished to repair. When Mrs. Armstrong asked the investigator to explain the offer, he indicated that he did not understand it either, but that there "was something . . . in the policy that was percentage-wise,"⁵ and that the insurance coverage would not pay for the full cost of repair.

Mrs. Armstrong declined both offers and contacted an attorney. A banker who had appraised property in the area an average of two or three times a week for twenty years was retained, along with another appraiser, to inspect the property, appraise its value, and arrive at an estimate of the cost necessary to restore the house to a livable condition. The banker estimated the value of the house before the fire, exclusive of the land, to be \$15,000 and determined that the value of the house after the fire was \$6,500. The banker's appraisal of the damage was \$8,500, or in other words, he felt that the value of the farmhouse was decreased by the repair cost.

³*Id.* at 618-19.

⁴In the 10 years before the fire, the Armstrong's had installed new aluminum siding, kitchen cabinets, and a new furnace. Then, in the 18 months preceding the fire, two closets were added; hardwood paneling and ceiling tile were installed in the living room, the dining room, and in four second floor bedrooms; and new floor tile was put in the dining room. The extensive nature and immediacy of the improvements were thus distinguishing features of this case.

⁵384 N.E.2d at 611.

Later, the insurance company admitted that the estimate of \$8,769.62 obtained by its representative and the contractor was fair and reasonable; the investigator testified that he had mistakenly adjusted the claim through an inapplicable policy provision which, in his opinion, restricted his offer to the insured to no more than \$4,288.58 because the condition of the house called for a fifty-percent depreciation deduction.⁶

The next reported communication from the insurer occurred more than seven months after the fire. In a letter from a supervisor of the insurance company to the insured's attorney, the supervisor enclosed a check for \$6,497.22 and explained that the proposed settlement was determined by applying a twenty-five percent depreciation factor to all repair costs to avoid betterment of the 100-year-old house. The letter was the first written notification of a depreciation reduction percentage. The offer was refused and the check was returned.

Judgment was entered by the trial court following a jury verdict for the insured awarding compensatory damages of \$8,769.62 and punitive damages of \$25,000. Interest on the compensatory damage award was computed at \$1,785.13 by the court, based on a stipulated annual percentage rate of eight percent. The insurer appealed, contesting error in each element of the judgment. Issues of the admission of testimony and of the court's instructions were also raised by the insurance company.

The contract of insurance did not contain a coinsurance or pro-rata clause;⁷ nothing in the policy language indicated that any deduction should be taken for depreciation.⁸ The term "actual cash value" was thus in question. The court of appeals, noting that an insurance contract was not subject to real bargaining and was therefore a contract of adhesion, indicated that questions of interpretation of ambiguous terms would be resolved against the insurer to the benefit of the insured.⁹ Because a fire insurance contract is a contract of in-

⁶*Id.* at 612.

⁷*Id.* at 613.

⁸The loss payable clause in the insurance contract read as follows:

[T]his Company . . . to an amount not exceeding the amount(s) above specified, does insure the Insured . . . to the extent of the actual cash value of the property at the time of the loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss . . . against all DIRECT LOSS BY FIRE

Id. at 612. The phrase "actual cash value" was not defined in the policy. The insurance company claimed that its loss was limited to the actual cash value of the direct loss by fire incurred by the insured and that cash value as used in the above language meant an allowance for depreciation should be subtracted from the replacement cost.

⁹*Id.* at 613. See *Freeman v. Commonwealth Life Ins. Co.*, 149 Ind. App. 211, 271 N.E.2d 177 (1971), *transfer denied*, 259 Ind. 237, 286 N.E.2d 396. The *Travelers* court

demnity in which the insurer "undertakes to make the insured whole for the loss of insured property caused by fire,"¹⁰ the court reasoned that the principle of indemnity had to underlie the interpretation of the term "actual cash value."¹¹

"Actual cash value" had not previously been defined by Indiana courts. The appellate court used cases from other jurisdictions to assist in its analysis, arriving at the conclusion that "the phrase actual cash value, within the context of the fire insurance policy in the case at bar, means an amount of money, within the policy limit, sufficient to restore, repair, or replace the property destroyed."¹²

Travelers Indemnity Company relied upon the Tennessee case of *Braddock v. Memphis Fire Insurance Corp.*¹³ to support its subtraction of depreciation from the repair estimate. In the *Braddock* case, the court considered a casualty loss which totally destroyed the insured's fifteen-year-old roof. The replacement cost of the roof was \$247. The claim was denied because the Tennessee Supreme Court felt the insured would realize a profit by having a new roof instead of the old roof.¹⁴

cited *O'Meara v. American States Ins. Co.*, 148 Ind. App. 563, 268 N.E.2d 109 (1971), for authority that an insurance contract term was ambiguous if reasonably intelligent men would honestly differ on the meaning after reading it. 384 N.E.2d at 613.

¹⁰384 N.E.2d at 613. See *First Nat'l Bank v. Boston Ins. Co.*, 17 Ill. App. 2d 159, 149 N.E.2d 240 (1958); *Butler v. Aetna Ins. Co.*, 64 N.D. 764, 256 N.W. 214 (1934). In support of the concept that a contract of indemnity required full restitution to the insured, the court also quoted from *Washington Mills Mfg. Co. v. Weymouth Ins. Co.*, 135 Mass. 503, 506-07 (1883), as follows:

The contract of the insurer is not that if the property is burned, he will pay its market value; but that he will indemnify the assured, that is, save him harmless, or put him in as good a condition, so far as practicable, as he would have been in if no fire had occurred.

384 N.E.2d at 613.

¹¹384 N.E.2d at 613.

¹²*Id.* at 615 (citing *Glens Falls Ins. Co. v. Gulf Breeze Cottages*, 38 So. 2d 828 (Fla. 1949) (actual cash value is the amount of money required to put the roof of a building in as near as possible the same condition before the loss without allowance for depreciation); *General Outdoor Advertising v. LaSalle Realty*, 141 Ind. App. 247, 218 N.E.2d 141 (1966); *Fedas v. Insurance Co. of State of Pa.*, 300 Pa. 555, 151 A. 285 (1930) (actual cash value means the cost to replace a building or chattel as of the date of a fire, considering the use and function of the property); *Third Nat'l Bank v. American Equitable Ins. Co.*, 27 Tenn. App. 249, 178 S.W.2d 915 (1943) (depreciation may not be deducted from the cost of replacement because to do so would make the recovery fall short of the principle of indemnity)). The *LaSalle* court held that in the determination of damages for a partial tortious injury to a building with value separate from the real estate when the cost of restoration does not exceed the fair market value of the building before the damage, the proper measure is the cost of restoration. 141 Ind. App. at 267, 218 N.E.2d at 151. An analogy was drawn between this tort remedy of restitution and the principle of indemnity in the *Travelers* case. 384 N.E.2d at 615.

¹³493 S.W.2d 453 (Tenn. 1973).

¹⁴The Tennessee Supreme Court stated: "A fire insurance contract is a contract of indemnity. Its purpose is to reimburse the insured; to restore him as nearly as

The Indiana Court of Appeals indicated that the *Braddock* case did not accomplish the necessary indemnification required by the insurance contract.¹⁵ In *Braddock*, the “insurance company arbitrarily reduced the estimated cost of replacement by a depreciation factor” and then subtracted the \$50 deductible amount required by the policy, leaving the insured with a net settlement of only \$11 in exchange for his fifteen-year-old roof.¹⁶ According to the *Travelers* court, even with the \$50 deductible added back, \$61 was not enough to give the insured the functional efficiency of the old roof.¹⁷

The Indiana decision requires that the purpose and function of the property be considered to preserve its intrinsic value.¹⁸ Referring to the Pennsylvania case of *Farber v. Perkiomen Mutual Insurance Co.*,¹⁹ the court concluded:

[T]he risk is necessarily affected by changing economic conditions, such as, the increasing costs of labor and materials. Because it is the insurer's undertaking to make the insured whole within the policy limits, the augmented damage resulting from increased costs of labor and materials is the liability of the insurer up to the stated limit of the insurance.²⁰

Although *Travelers* alleged several errors in the jury verdict on compensatory damages, the court of appeals quickly dismissed the charges. The court determined that the jury could ignore depreciation because the fire damage was largely confined to the interior of

possible to the position he was in before the loss. The replacement-less-depreciation rule and the broad evidence rule operate to accomplish indemnity.” *Id.* at 459-60. The Tennessee Supreme Court further stated:

“While replacement cost is a dominant factor in fixing the amount of recovery for total loss of a building, it plays an even greater part in fixing the amount of recovery for a partial loss to a building. It would seem that the only practical way to measure the extent of partial damage to a building would be to inventory its damaged parts, and the only way to express such damage in terms of money would be to count the cost of replacing such parts, so as to restore the building to the same condition it was in just before the fire. And the view which we think supported by the better reason and the greater weight of authority is that depreciation may not be deducted from such cost because that would make the sum insufficient to complete the repairs and would leave the building unfinished; and this would fall short of the indemnity contracted for in the policy.”

Id. at 457 (quoting *Third Nat'l Bank v. American Equitable Ins. Co.*, 27 Tenn. App. 249, 272-73, 178 S.W.2d 915, 925 (1943)).

¹⁵384 N.E.2d at 614.

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.*

¹⁹370 Pa. 480, 88 A.2d 776 (1952). See *Metz v. Travelers Fire Ins. Co.*, 355 Pa. 342, 49 A.2d 711 (1946).

²⁰384 N.E.2d at 615.

the house which had been renovated within ten years of the fire, and the majority of the work having been done within eighteen months of the loss.²¹ Further, the court stated that the admission of the bank official's testimony as an expert was properly the decision of the trial court and would not be disturbed unless there was a manifest abuse of discretion.²² Also, the trial court's instruction to the jury was held to be a correct statement of the law.²³

In addition to full compensatory damages, the trial court jury awarded Mrs. Armstrong \$25,000 in punitive damages. Punitive damages have been an important part of Indiana insurance law for several years and may properly be granted to an insured when the insurer engages in "fraud, malice, gross negligence, or oppression."²⁴ After making both oral and written statements to the insured over a period of several months that the policy required a deduction for depreciation, the insurer admitted both by written interrogatories that became part of the record and by direct testimony that no such policy provisions existed.²⁵ The court reasoned that, even assuming that the property had diminished in value, no flat depreciation

²¹*Id.*

²²*Id.* at 616-17 (citing *Isenhour v. State*, 157 Ind. 517, 528, 62 N.E. 40, 44 (1901)).

²³384 N.E.2d at 616, 619. The court noted that Travelers had failed to provide an alternative instruction on the matter and chose instead to simply object to the plaintiff's tendered instruction. *Id.* at 616-17. The trial court gave the following instruction to the jury:

If you find from a preponderance of the evidence and under the court's instructions that the defendant was guilty of willfully injuring the plaintiff by false representations to the plaintiff concerning the legal effect of the provisions in the insurance policy, and that this conduct was willful, oppressive, malicious, or the statements were made with heedless disregard of their consequences, and that as a result thereof, Mrs. Armstrong was damaged, and if you further find that Mrs. Armstrong is entitled to recover compensatory or actual damages, then you may, also, allow to her exemplary or punitive damages as well.

Exemplary damages are damages allowed as punishment by way of example and to deter others from committing a like act. If you allow exemplary damages, they may be in such amount as you find sufficient to punish the defendant for its conduct and to act so as to be a deterrent to others.

Id. at 619.

²⁴*Hibschman Pontiac, Inc. v. Batchelor*, 266 Ind. 310, 314, 362 N.E.2d 845, 847 (1977) (quoting *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 349 N.E.2d 173 (1976)). See *Vernon*, 264 Ind. at 609, 349 N.E.2d at 180, discussed in Frandsen, *Insurance, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 243, 243 (1976); *Jeffersonville R.R. Co. v. Rogers*, 38 Ind. 116 (1871); *Rex Ins. Co. v. Baldwin*, 163 Ind. App. 308, 313, 323 N.E.2d 270, 274 (1975). See also *Norfolk & Western Ry. Co. v. Hartford Accident & Indem. Co.*, 420 F. Supp. 92 (N.D. Ind. 1976), discussed in Mortensen, *Insurance, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 187, 192 (1978).

²⁵384 N.E.2d at 617.

deduction would be appropriate for such items as labor, overhead, and taxes.²⁶ The court of appeals indicated that an across-the-board depreciation deduction was not appropriate and that the offers of the insurer to Mrs. Armstrong were "oppressive and indicative of a heedless disregard of the consequences."²⁷ Noting that fraud need not be proved to support a punitive damage award, the appellate court upheld the trial court's jury instruction.²⁸

Finally, because the interest granted by the trial court was computed on a stipulated annual rate of eight percent, according to an agreement by the parties, the insurer did not have a valid objection to its imposition by the trial court. Although the insurer also objected to the amount, no demonstration of the mathematical inaccuracy of the interest charge was offered; therefore, no error was shown.²⁹

B. *Prorata Contribution*

The Indiana Supreme Court, in *Ryder Truck Lines, Inc. v. Carolina Casualty Insurance Co.*,³⁰ determined that each of two insurers was liable prorata for the settlement amount above the policy deductible floor when the policies contained conflicting provisions.³¹ The decision reversed the holding of the court of appeals³² and the trial court and thus clarified Indiana law.

The claim arose when the driver of a truck leased by Ryder Truck Lines collided with an automobile, injuring the occupants of the auto. On the day of the accident, Ryder entered into a one-way lease of a tractor-trailer for the purpose of transporting foods from Gary, Indiana, to Nashville, Tennessee. The lease called for Corkren & Company, owner of the tractor-trailer, to receive seventy-three percent of the fee Ryder earned for the transportation service. In addition to the tractor-trailer, Corkren provided a driver at its expense and agreed to maintain the vehicle, including payment of all

²⁶*Id.* at 618.

²⁷*Id.* at 618-19. The court characterized the insurance company's written offer which included a uniform 25% reduction in replacement value to avoid betterment of the house as "a ludicrous notion." *Id.* at 618.

²⁸*Id.* at 619. The trial court instructed the jury as follows: "You are instructed that you may draw reasonable inferences from the evidence, and fraud need not in every case be proved by positive evidence if facts and circumstances are present from which fraud is inferred." *Id.* See *Jones v. Abriani*, 350 N.E.2d 635 (Ind. Ct. App. 1976).

²⁹384 N.E.2d at 620.

³⁰385 N.E.2d 449 (Ind. 1979).

³¹*Id.* at 452.

³²372 N.E.2d 504 (Ind. Ct. App. 1978). Both the trial and appellate court had held that Liberty Mutual Insurance Company was the primary carrier and should bear the total loss, less the deductible paid by Ryder.

repairs, gas, and oil. The driver of the tractor-trailer, however, was operating the vehicle under the authority of Interstate Commerce Commission (ICC) permits and Public Service Commission of Indiana permits issued to Ryder.

The driver collided with the automobile en route to Nashville, Tennessee. The injured parties settled the claim for \$46,000. Ryder paid the \$25,000 deductible amount according to the liability insurance policy it held with Liberty Mutual Insurance Company. Liberty Mutual paid the additional \$21,000 and then sought indemnity from Corkren's carrier, Carolina Casualty Insurance Company. The two carriers could not agree on the question of indemnification and suit was brought by Ryder and Liberty against Carolina. After unsuccessful attempts in the trial court and court of appeals, the Indiana Supreme Court held that Liberty Mutual and Carolina Casualty were liable prorata for the \$21,000 amount.³³

The Liberty Mutual policy and the Carolina Casualty policy both contained clauses which restricted the liability of the insurer if "other insurance" was available to cover the loss.³⁴ Further, the Liberty Mutual policy contained a required ICC clause which was promulgated to assure compensation to injured parties and to promote highway safety.³⁵ The interplay of the "other insurance" provisions in both policies with the ICC endorsement in the Liberty Mutual policy created the central question resolved by the supreme court.

Citing with approval an earlier opinion in *Indiana Insurance Co. v. American Underwriters, Inc.*,³⁶ the *Ryder* opinion indicated that the reconciliation of "other insurance" provisions and the ICC clause had been achieved in Indiana by recognizing "dual primary liability" and apportioning liability between the insurers.³⁷ Further buttress-

³³385 N.E.2d at 452.

³⁴*Id.* at 450.

³⁵The Liberty Mutual ICC endorsement stated in pertinent part:

Within the limits of liability hereinafter provided it is further understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, or any other endorsement thereon or violation thereof, or of this endorsement, by the insured, shall relieve the Company from liability hereunder or from the payment of any such final judgment, irrespective of the financial responsibility or lack thereof or insolvency or bankruptcy of the insured.

Id. See 49 C.F.R. § 1043.1 (1970). The endorsement is required by § 215 of the Interstate Commerce Commission Act, 49 U.S.C. § 315 (1976). This endorsement is known as Form B.M.C. 90. See 49 C.F.R. § 1003.2 (1970).

³⁶261 Ind. 401, 304 N.E.2d 783 (1973), cited in 385 N.E.2d at 450.

³⁷385 N.E.2d at 450-51. The relevant portion of *Indiana Ins. Co. v. American Underwriters, Inc.* reads as follows:

Both policies, when read separately, appear to afford coverage to the insured. Yet each "other insurance" provision forces an examination of its

ing the conclusion that a prorata indemnification between the insurers was the proper result, the court noted that the driver of the leased vehicle, in circumstances of this nature, is a joint employee of the vehicle owner and the lessee.³⁸

The court stated that "once the basic goal of compensating the injured third party is achieved, the liabilities of the two insurers covering the same loss should turn on the terms of their respective policies,"³⁹ and thus the court indicated that its reasoning in *Indiana Insurance* should be followed rather than the approach used by the court of appeals.⁴⁰ *Transport Indemnity Co. v. Rollins Leasing Corp.*⁴¹ was discussed by the court as further authority for the concept that express policy provisions may still be honored while complying with the requirements of the ICC endorsement by the two insurers sharing liability.⁴²

Ryder and Liberty Mutual also argued that Carolina Casualty should reimburse Ryder for the \$25,000 paid by Ryder because of the deductible provision in Liberty Mutual's policy. Carolina Casualty's policy contained an "excess insurance" clause which the court held did not apply to the deductible amount.⁴³ Agreeing on this

opponent. This "circular riddle" can be resolved by (1) attempting to give effect to one policy provision over the other, or (2) applying mechanical or arbitrary rules . . . , or (3) holding both clauses to be conflicting and mutually repugnant and, therefore, disregarding them. We find the last mentioned alternative to be the most reasonable. This method not only provides indemnification for the insured, but also, through the process of proration, gives effect to the general intent of the insurers.

. . . .

In such a case [as this] there exists *dual* primary liability.

Id. at 451 (citing 261 Ind. at 407, 304 N.E.2d at 787).

³⁸*See* *Transport Motor Express, Inc. v. Smith*, 262 Ind. 41, 311 N.E.2d 424 (1974); *Jones v. Furlong*, 121 Ind. App. 279, 97 N.E.2d 369 (1951).

³⁹385 N.E.2d at 451.

⁴⁰*Id.* at 451-52. The principal case relied upon by the court of appeals, *Argonaut Ins. Co. v. National Indem. Co.*, 435 F.2d 718 (10th Cir. 1971), interpreted the ICC endorsement to mean that the lessee's insurer is primarily liable, regardless of any other policy provisions or private agreements. 385 N.E.2d at 451. *See also* *Indiana Ins. Co. v. Parr Trucking Serv. Ins.*, 510 F.2d 490 (6th Cir. 1975).

⁴¹14 Wash. App. 360, 541 P.2d 1226 (1975), *discussed in* 385 N.E.2d at 451.

⁴²The court noted that the "excess" insurance clauses of the two automobile policies involved in *Rollins* were very similar to the "other insurance" clauses in the present case. 385 N.E.2d at 451. The *Rollins* court stated that although the one insurer had agreed to be unconditionally bound to indemnify its insured, it did not agree to bypass its opportunity for contribution from another insurer. 14 Wash. App. at 363-64, 541 P.2d at 1229. *See also* *National Mut. Ins. Co. v. Liberty Mut. Ins. Co.*, 90 U.S. App. D.C. 362, 196 F.2d 597 (1952); *Argonaut Ins. v. Transport Indem.*, 6 Cal. 3d 496, 492 P.2d 673, 99 Cal. Rptr. 617 (1973).

⁴³385 N.E.2d at 452. The excess insurance clause in Carolina Casualty's policy read:

With respect to any automobile of the commercial type while leased or

issue with the court of appeals, the Indiana Supreme Court reiterated the rule that excess coverage is applicable only when the limits of the primary policy have been exhausted.⁴⁴

C. Direct Loss

A loss resembling consequential damage was determined to be a direct loss from a tornado by the court of appeals in *Farmers Mutual Aid Association v. Williams*.⁴⁵ Affirming the decision of the trial court, the appellate court held that the term "direct loss" was ambiguous and sustained recovery of the insured for loss caused by a premature sale of seventeen steers.⁴⁶

Charles Williams was a cattle breeder with forty years of experience operating a farm and feedlot in which he had a barn, a confinement area for cattle fattenings, and grain supplies for feeding twenty head of steers. He was insured against damages by a tornado with Farmers Mutual Aid Association. In 1974 a tornado totally destroyed the barn and the confinement area, substantially damaged the feed supplies, and killed three steers that were being prepared for future sale. Because there was no barn or corral, the remaining seventeen steers were put on range pasture instead of the more advantageous special grain fattening ration. The change in diet and location caused the cattle to rapidly lose weight. Williams felt that the circumstances brought about by the tornado damage dictated immediate sale of the remaining seventeen steers, even though they had not yet reached their maximum weight. The sale resulted in a loss of profit. Farmers Mutual paid the claim for the barn, the confinement area, the damaged grain, and the three dead steers but contested Williams' claim for the loss caused by early sale of the remaining seventeen head of cattle, contending that the insurance policy indemnified against direct loss only. The stipulated damages of \$2,400 were awarded Williams by the trial court, and the judgment was affirmed by the court of appeals.

The court noted that the term "direct" was not defined within the policy language.⁴⁷ The holding that "direct" was an ambiguous

loaned to any person or organization, other than the name insured, engaged in the business of transporting property by automobile for others, or any hired private passenger automobile insured on the "cost of hire" basis, or any non-owned automobile, the insurance shall be excess insurance over any other valid and collectible insurance.

372 N.E.2d at 510.

⁴⁴385 N.E.2d at 452. See generally J. APPELMAN, 8 INSURANCE LAW & PRACTICE § 4914 (rev. ed. 1962). Ryder was, in effect, a self-insurer for the deductible amount.

⁴⁵386 N.E.2d 950 (Ind. Ct. App. 1979).

⁴⁶*Id.* at 952.

⁴⁷*Id.*

term was reinforced by the testimony of the president of Farmers Mutual Aid Association that the term "direct" could not be precisely defined.⁴⁸ The balance then tipped in favor of the insured as the court concluded that if an expert could not define the term "direct," it was reasonable to expect a layman to have an understanding different from that of the insurer.⁴⁹ The court felt it was required to interpret the ambiguous term in favor of the insured and reasoned that Williams' reasonable expectation was of coverage for the loss.⁵⁰

Williams felt it would take from two to four weeks to reverse the declining condition of the cattle; another expert offered the same conclusion.⁵¹ The decision made by the insured to sell the cattle was brought about by their immediate weight loss and by other conditions caused by the tornado. Thus, the analysis of Williams' monetary loss followed the traditional "but for" reasoning of tort law, resulting in an insurance payment for property damage as well as for additional consequential loss. The result reflects the growing trend of courts to favor the insured when disputes over policy language arise and broadens the potential recovery in similar future occurrences.

D. Construction Agreements

In *Morsches Lumber, Inc. v. Probst*,⁵² it was held that an agreement to provide insurance is also an agreement to limit the recourse of the policy owner to its proceeds only, even though the loss may be caused by negligence of the other party.⁵³ The result should encourage caution when an insurance allocation agreement is part of a construction contract.

Morsches Lumber, Inc. built a cattle pole barn for Walter F. Probst. The construction agreement entered into by the two parties required Probst to insure for fire and windstorm damage and Morsches to purchase liability and workmen's compensation insurance. The barn, partially completed, was destroyed in a windstorm, and

⁴⁸*Id.* The appellate court was required to view the evidence in a manner most favorable to the insured and could not reweigh the evidence or the credibility of witnesses. *Id.* See *Long v. Johnson*, 381 N.E.2d 93 (Ind. Ct. App. 1978). Also, "direct" was an ambiguous term because reasonably intelligent men could honestly differ as to its meaning. 386 N.E.2d at 952 (citing *Utica Mut. Ins. Co. v. Ueding*, 370 N.E.2d 373 (Ind. Ct. App. 1977)).

⁴⁹386 N.E.2d at 952.

⁵⁰*Id.*

⁵¹*Id.* Both the insured and a veterinarian familiar with Williams' marbling operation also testified that the usual means for caring for the cattle were no longer available and that the cattle suffered rapid weight loss because their diet changed to range roughage in lieu of the fattening feeds.

⁵²388 N.E.2d 284 (Ind. Ct. App. 1979).

⁵³*Id.* at 287.

Probst's claim settlement from his insurance only covered approximately seventy-five percent of the loss. The trial court determined that Morsches had been negligent in the construction of the barn, that the negligence was the proximate cause of the destruction, and that Probst was entitled to reimbursement from Morsches of the portion of the loss not covered by insurance. The question of Morsches' negligence was not considered on appeal; instead, the appellate court considered the question "whether an agreement to provide insurance constitutes an agreement to limit the recourse of the party acquiring the policy solely to its proceeds even though the loss may be caused by the negligence of the other party to the agreement."⁵⁴

Several decisions from other jurisdictions were cited by the court to illustrate the principle that agreements to insure limit compensation to insurance proceeds.⁵⁵ The references by the court to two cases are particularly noteworthy. A Maryland court stated:

[W]here parties to a business transaction mutually agree that insurance will be provided as a part of the bargain, such agreement must be construed as providing mutual exculpation to the bargaining parties who must be deemed to have agreed to look solely to the insurance in the event of loss and not to liability on the part of the opposing party.⁵⁶

A similar holding was reached by a Pennsylvania court which held that "in commercial agreements between two business concerns a provision that one will maintain insurance against certain risks indicates an intention to grant immunity to the other from liability, even though loss is caused by the negligence of the other."⁵⁷

The court then reasoned that the cases referred to dealt with a fire loss which was more likely to be the result of negligence than a windstorm; that many of the cases were complex transactions of which a fire risk was a fully anticipated risk, unlike the instant case in which the transaction was so simple that no plans or specifica-

⁵⁴*Id.* at 285. The specific language of the insurance allocation agreement was not stated; thus, the wording chosen by the court to frame the issue is illustrative of the type of agreement involved.

⁵⁵*Id.* at 285-86. *See* *Newport News Shipbuilding & Dry Dock Co. v. United States*, 34 F.2d 100 (4th Cir. 1929) (indirect payment of insurance premiums was part of the construction costs and could have been assumed by either party); *Rock Springs Realty, Inc. v. Waid*, 392 S.W.2d 270 (Mo. 1965) (rent payments are indirect insurance premiums when insurance is to be paid for by the lessor).

⁵⁶*General Cigar Co. v. Lancaster Leaf Tobacco Co.*, 323 F. Supp. 931, 941 (D. Md. 1971), *quoted in* 388 N.E.2d at 286.

⁵⁷*Hearst Magazines v. Cuneo E. Press Inc.*, 293 F. Supp. 824, 829 (E.D. Pa. 1968), *quoted in* 388 N.E.2d at 286.

tions were made; and that in Indiana an express stipulation must be made for a party to be exonerated from his own negligence.⁵⁸

The case was ultimately decided by the use of the reasonable expectations of the parties standard, based upon the understanding of the individuals concerned.⁵⁹ The court reasoned that the parties, through their agreement, intended that each would provide particular insurance to protect both individuals no matter what the cause of the loss and that Probst's recovery was therefore limited to the proceeds of the insurance policy he purchased.⁶⁰ Based on the holding, it would seem advisable for clients involved in construction agreements to personally procure sufficient coverage for any risks they do not personally wish to bear.

E. Life Insurance Policy Provisions

The district court granted summary judgment to the insurer in *Great Horizons Development Corp. v. Massachusetts Mutual Life Insurance Co.*⁶¹ The court held that the life insurance policy issued by Massachusetts Mutual Life Insurance Company on the life of an executive of Great Horizons Development Corporation lapsed for non-payment of premiums,⁶² that the insurer was not required to give a thirty-one day advance notice to the policyowner or any other party prior to termination of the policy by the insurer⁶³ and finally, that the insurer did not have a duty, implied or otherwise, to keep the insured informed of the existing loan value of the policy for purposes of the payment of premiums.⁶⁴

Life insurance policy terms often do not have the precise meaning to the public that they do to those more intimately involved in the life insurance industry. Further, the area of life insurance is specialized and quite distinct from that of casualty insurance or fire and marine protection. The problem of thoroughly understanding the implications of life insurance terminology is further compounded by the long-term nature of permanent or cash value life insurance when compared with the more immediate and relatively short period of coverage provided by other forms of insurance. Permanent or cash value life insurance is an intangible product designed to serve

⁵⁸388 N.E.2d at 286.

⁵⁹*Id.* at 286-87.

⁶⁰*Id.* at 287. The court chose to follow the line of cases which indicated that "an agreement to insure is an agreement to provide both parties with the benefits of insurance."

⁶¹457 F. Supp. 1066 (N.D. Ind. 1978).

⁶²*Id.* at 1082.

⁶³*Id.*

⁶⁴*Id.*

the insured for a lifetime, often during unexpected, changing circumstances. *Great Horizons* provides a legal framework to aid the Indiana attorney in correct interpretation and application of common policy provisions.

The controversy decided by the federal court arose in a fairly common business context. A \$250,000 key executive life insurance policy was acquired in 1973 by Great Horizons on the life of its deceased president.⁶⁵ By 1974, Great Horizons was experiencing cash flow problems, and thus some of the premiums on the policy were paid through the policy's automatic premium loan provision. When the 1975 premium became due, the cash value in the policy was insufficient to cover the premium through the automatic premium loan feature, so Great Horizons arranged to pay the difference by check. After this premium had been paid through the combination of separate check and automatic premium loan, the total indebtedness on the policy, including interest from past invasions of the cash value, equalled the value of the policy. Massachusetts Mutual did not notify Great Horizons that it would terminate the policy, although it had the right to discontinue coverage at its option through the policy language. The next premium was not paid, the thirty-one-day grace period expired, and no further premiums were paid on the policy.⁶⁶ When the insured died in 1975, Great Horizons submitted proof of death and a claim for benefits. Massachusetts Mutual refused to pay the claim and suit was brought by Great Horizons. The trial court found that there were no genuine issues about any material facts and granted summary judgment.

The significance of *Great Horizons* is in the discussion by the court of the policy terminology. Indiana courts have had little opportunity to provide a thorough definition of terms such as premiums, premium notices, nonforfeiture provisions, policy loans, automatic

⁶⁵The policy was first issued in 1969 on the deceased when he was president of another corporation and was transferred in 1973 to Great Horizons. The insured was charged an extra premium or rating because of the medical history discovered at the time of underwriting, and the policy also had a provision allowing for lower premiums during the first three policy years. In the first year of the policy, premiums were paid by a pre-authorized monthly check. The premiums were then paid on an annual basis for the next four years, using a combination of corporate checks and policy loans. As is customary with this type of financed premium, separate policy loan request forms were completed; these policy loans were not in any way affected by the automatic premium loan provision of the policy.

⁶⁶On approximately May 28, 1975, Massachusetts Mutual erroneously mailed a dividend check to Great Horizons for \$1,555. The check should not have been sent because at that time the policy was not in force. Although Massachusetts Mutual requested the return of the dividend check, Great Horizons refused their demand.

premium loans, and dividends, or to examine the relationship between dividends and cash or loan value.⁶⁷

The court discussed several cases in which policy indebtedness equalled or exceeded the policy value when the policy automatically terminated without additional notice to the insured, thus illustrating the relationship between premiums, loan values, and termination provisions.⁶⁸ These decisions also clearly illustrated the conclusion that "a premium lapse provision is separate and distinct from a provision requiring notice prior to voiding a policy in which total indebtedness equals or exceeds the value of the policy."⁶⁹

Policy provisions similar to those in *Great Horizons* were construed by the Missouri Supreme Court in *Robb v. Metropolitan Life Insurance Co.*,⁷⁰ and were discussed by the federal court.⁷¹ In *Robb*, the plaintiff asserted that the provisions for policy lapse upon non-payment of premiums must be interpreted together with other requirements, including a one-month notice. The *Robb* court held:

The two provisions are separate and distinct, not inconsistent, and both should be given effect. Under the policy, upon

⁶⁷A distinction is properly made between cash value and loan value. The cash value of the policy, in general terms, is the amount for which the policy may be surrendered to the issuing insurance company. The loan value is always less than the cash value and is usually less than the cash value by an amount equal to the annual percentage rate charged on the loan. This rate ranges from four percent simple interest in older policies to eight percent in more recent policies.

⁶⁸457 F. Supp. at 1075-77. See *Bauge v. Crown Life Ins. Co.*, 473 F.2d 787 (9th Cir. 1972) (policy provision requiring a 30-day notice prior to policy lapse was not applicable when previous automatic premium loans had exhausted the cash value); *Pacific Mut. Life Ins. Co. v. Davin*, 5 F.2d 481 (4th Cir. 1925) (policy lapsed for nonpayment of premium without notice to the insured when total indebtedness exceeded the cash surrender value of the policy); *Loss v. Mutual Life Ins. Co.*, 230 F. Supp. 329 (S.D.N.Y. 1963) (no notice prior to forfeiture when policy lapsed for failure to pay premiums and automatic premium loan provision was inapplicable because of previous policy loans); *Rick v. John Hancock Mut. Life Ins. Co.*, 230 Mo. App. 1084, 93 S.W.2d 1126 (1936) (nonforfeiture provision that required extended term insurance could not operate because insured had previously borrowed the maximum amount; policy lapsed for non-payment of premiums without notice required); *Heuring v. Central States Life Ins. Co.*, 230 Mo. App. 42, 87 S.W.2d 661 (1935) (insurer utilized the automatic premium loan provision of the policy to pay premiums until indebtedness exceeded the value of the policy; policy terminated for nonpayment of premiums without notice to the insured irrespective of 30-day notice provision in the policy); *Columbus Mut. Life Ins. Co. v. Hines*, 129 Ohio St. 472, 196 N.E. 158 (1935) (policy provision requiring notice to the insured before termination would not prevent an automatic termination of coverage when there was a default in premiums); *Presentation Sisters Inc. v. Mutual Benefit Life Ins. Co.*, 85 S.D. 678, 189 N.W.2d 452 (1971) (policy lapsed because premium was not paid and not because loan was not paid).

⁶⁹457 F. Supp. at 1077.

⁷⁰351 Mo. 1037, 174 S.W.2d 832 (1943).

⁷¹457 F. Supp. at 1077-78.

default in the payment of the premium and the expiration of the ensuing period of grace, the policy lapsed without any notice to the insured, and that was true regardless of whether or not there was an existing policy loan.⁷²

The federal court restated the concept that the loan value is the property of the insurance company and not the insured unless there is a clear agreement to the contrary.⁷³ The court indicated that dividends, when declared, may be used to pay premiums at the insured's discretion but that loan values may only be used through the automatic premium loan provision by the insurance company when a premium was not paid by the end of the grace period.⁷⁴

In addition to the discussion of terminology, the case indicates that insurance companies can continue to rely on established legal meanings for existing policy language. The current trend to simplify insurance contract language, meritorious as it may be, may perhaps lead to protracted future litigation on much the same questions of interpretation that have been so laboriously decided by earlier courts.

⁷²351 Mo. at 1042, 174 S.W.2d at 838, *quoted in* 457 F. Supp. at 1078.

⁷³457 F. Supp. at 1079.

⁷⁴*Id.*

XI. Labor Law

*Richard J. Darko**

A. *Employment Security Act*

In the leading case of this and recent years dealing with unemployment benefits, the Indiana Supreme Court wrote the final chapter, accepting transfer and vacating the opinion below, in *Wilson v. Review Board of Indiana Employment Security Division*.¹ The Indiana Court of Appeals, in a decision discussed at length in the 1978 Survey of Labor Law,² had itself vacated its own earlier opinion.³ After Donna Wilson was terminated from her employment, she filed an initial claim for benefits with the Indiana Employment Security Division and was recognized by the division as an insured worker. She began receiving benefits. Shortly thereafter, the employer reported to the division that it had twice offered to reinstate her, and that she had refused both offers. The division terminated her benefits pursuant to a statutory provision under which an insured worker can be found ineligible for reasons such as refusal to apply for or accept suitable work when offered, without good cause.⁴

Wilson filed two judicial proceedings, the first seeking review in the court of appeals of the decision of the review board denying unemployment compensation benefits, and the second, in Marion County Circuit Court, seeking a declaratory judgment that the procedure by which the division suspended the claimant's benefits violated due process guarantees afforded by the state and federal constitutions. The two proceedings were consolidated for review in the court of appeals, but the supreme court accepted transfer only on the constitutional issues.

The court of appeals had concluded that unemployment benefits constitute a property interest protected by the requirements of due process, and that consequently an insured worker's benefits could be suspended or terminated only after the worker had been provided

*Partner, Bingham, Summers, Welsh & Spilman. B.A., University of Notre Dame, 1965; J.D., Indiana University School of Law, 1968.

¹385 N.E.2d 438 (Ind. 1979). See also Greenberg, *Administrative Law*, 1979 *Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 39, 45 (1980).

²See Archer, *Labor Law*, 1978 *Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 212, 223-24 (1979).

³373 N.E.2d 331 (Ind. Ct. App. 1978), *vacating* 369 N.E.2d 675 (Ind. Ct. App. 1977).

⁴IND. CODE § 22-4-14-3 (1976).

with adequate notice and an opportunity for a hearing at which he could offer evidence or confront adverse witnesses.⁵

The court of appeals relied heavily upon *California Department of Human Resources Development v. Java*,⁶ in which the United States Supreme Court had affirmed a ruling that a California statute precluding payment of unemployment compensation benefits when an employer took an appeal from an initial determination of eligibility was inconsistent with the Social Security Act.⁷ The court also relied upon a recent amendment to the Indiana Employment Security Act providing that once an administrative determination of eligibility had been reached, benefits would continue to be paid to an insured claimant "unless said administrative determination had been reversed by a due process hearing."⁸

A four-member majority of the Indiana Supreme Court agreed that as an insured worker who was receiving benefits but whose claimed eligibility was later disputed, Wilson had a right to due process of law.⁹ However, the majority held that all that was required by the due process clause was "a procedural scheme whereby a claimant is afforded a full evidentiary hearing within a reasonable time after the termination of benefits."¹⁰ The supreme court thus disagreed with the court of appeals determination that due process required adequate notice and opportunity for a hearing at which the insured worker could offer evidence prior to suspension or termination of benefits.

The majority opinion distinguished *Java*, noting that *Java* had involved an employer appeal following an administrative determination of eligibility, whereas the present case involved an employee appeal following an administrative determination of ineligibility.¹¹ The court found the Indiana case to be more similar to *Torres v. New York State Department of Labor*,¹² in which the United States Supreme Court had summarily affirmed a district court determination that a full due process hearing was not required prior to suspension of benefits.¹³

⁵373 N.E.2d at 337-44.

⁶402 U.S. 121 (1971).

⁷42 U.S.C. § 503(a)(1) (1964).

⁸IND. CODE § 22-4-17-2(e) (Supp. 1979), *quoted in* 373 N.E.2d at 343.

⁹385 N.E.2d at 443.

¹⁰*Id.* at 445.

¹¹*Id.* See also Greenberg, *supra* note 1, at 47.

¹²405 U.S. 949 (1972).

¹³The *Torres* litigation had a history almost as tortured as that of *Wilson*. The district court originally found the New York statutory scheme to be adequate. 321 F. Supp. 432 (S.D.N.Y. 1971). While an appeal from that decision was pending, the Supreme Court decided *Java* and remanded the *Torres* decision for reconsideration in light of *Java*. 402 U.S. 968 (1971). Upon remand, the district court adhered to its

The majority opinion then turned to the question "whether Indiana's procedures provide claimants with a full hearing within a reasonable time after their benefits have been terminated."¹⁴ Relying upon statistics submitted by the division indicating that 89.1 percent of all appeals were completed within forty-five days and noting that Wilson had obtained a full hearing thirty-six days after her benefits were suspended, the court concluded that claimants in Indiana who appealed adverse eligibility determinations were afforded "a full evidentiary hearing within a reasonable time after their benefits had been discontinued."¹⁵

Justice DeBruler, in a brief dissent, suggested that the factual record presented to the supreme court was hazy and that the case should have been remanded to the trial court for an evidentiary hearing.¹⁶ The dissent also contended that the procedure employed by the division for resolving claims did not satisfy constitutional requirements of due process because there was no requirement that the deputy weigh any answer given by the claimant to the charges of the employer. The deputy is apparently free, according to the dissent, to consider only the employer's charge, wholly disregarding the insured's answer.¹⁷

The majority decision is difficult to reconcile with the language of the Indiana Employment Security Act, which was amended by the legislature in 1972 with the apparent intent to ensure that benefits are paid to an insured person until there has been a full due process hearing.¹⁸ By that amendment, the legislature deleted a provision which had stated: "In the event a hearing is requested, the payment of any disputed benefits with respect to the period prior to the final determination . . . shall be made only after such determination or decision."¹⁹ In place of that provision it adopted the provision stating that "[i]n the event a hearing is requested by an employer or the Division after it has been administratively determined that benefits should be allowed to a claimant, entitled benefits shall continue to

previously expressed opinion, distinguishing *Java* on its facts. 333 F. Supp. 341 (S.D.N.Y. 1971). On resubmission, the second opinion was summarily affirmed. 405 U.S. 949 (1972). *But see* Greenberg, *supra* note 1, at 47-48.

¹⁴385 N.E.2d at 445.

¹⁵*Id.* at 446.

¹⁶*Id.* (DeBruler, J., dissenting). The trial court had granted a motion to dismiss the complaint on grounds unrelated to the due process issue.

¹⁷*Id.* at 446-47.

¹⁸IND. CODE § 22-4-17-2(e) (1976) (amending Indiana Employment Security Act, Pub. L. No. 355, § 42(e), 1971 Ind. Acts 1430).

¹⁹Indiana Employment Security Act, Pub. L. No. 355, § 42(e), 1971 Ind. Acts 1431 (amended 1972).

be paid to said claimant unless said administrative determination has been reversed by a due process hearing."²⁰

Although the amendment refers to a request for a hearing by an employer or the division, not by a claimant, in the circumstances of a case such as *Wilson* that distinction is illusory, as noted by the court of appeals.²¹ *Wilson* had been determined to be an insured worker entitled to benefits unless subsequent events caused her disqualification. Those benefits were suspended by a deputy's decision based solely upon a communication from the former employer.

The majority opinion also appears to be inconsistent with prior precedent, particularly in the determination that it is reasonable for the division to suspend benefits for up to forty-five days for an insured person who has previously been found to be eligible. During the period of suspension, that insured person will receive no unemployment compensation.²²

The United States Supreme Court has previously stated that if welfare benefits were interrupted pending resolution of a controversy over eligibility, a recipient might be deprived of "the very means by which to live while he waits."²³ In a concurring opinion in *Java*, Justice Douglas rejected an argument that unemployment compensation benefits were not based on need, pointing out that "history makes clear that the thrust of the scheme for unemployment benefits was to take care of the need of displaced workers, pending a search for other employment."²⁴

As a result of the decision in *Wilson*, the division will be permitted to suspend payments to an insured worker, pending the outcome of a hearing, upon the mere suggestion by an employer that the worker has been disqualified for further payments.

The division did not fare as well on challenges of a violation of due process in *Wolfe v. Review Board of Indiana Employment Security Division*.²⁵ An employee who had quit his job was denied unemployment compensation because the review board found that he did not leave with good cause connected with the work. The employee had offered eight reasons why he quit, including the refusal of the employer to remedy dangerous working conditions and the making of physical threats by the employer, alleging generally that he had been forced out of the job. The findings adopted by the review board dealt only with three of the reasons

²⁰Indiana Employment Security Act Amendments, Pub. L. No. 174, § 2, 1972 Ind. Acts 848 (codified at IND. CODE § 22-4-17-2(e) (1976)).

²¹373 N.E.2d at 343-44.

²²See *Mathews v. Eldridge*, 424 U.S. 319, 339-40 (1976).

²³*Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

²⁴402 U.S. at 135 (Douglas, J., concurring).

²⁵375 N.E.2d 652 (Ind. Ct. App. 1978).

raised as cause by the employee, with no finding as to the other contentions.

The court first noted that all administrative agencies in Indiana, including the review board, have a constitutional obligation to afford "minimal due process" by supplying a statement of the reasons for a determination and an indication of the evidence upon which a decision maker has relied.²⁶ The court gave strong advice to the review board, and by implication to other administrative agencies, declaring: "Perhaps it is still the case that review boards do not know *how* to make specific findings. But, we believe that it is time the administrative boards learned. . . . Reviewing courts have been too tolerant of findings which are *not* things of beauty."²⁷ The case was remanded to the review board for specific findings of fact on each of the reasons given by the employee for terminating his employment.²⁸

The court acknowledged that its decision would require the referee or review board to play an active role in the proceedings and determine which comments or testimony by a claimant posed a valid issue for decision.²⁹ The board must then prepare findings dealing with each of the issues raised. Although this decision will impose additional burdens upon the division, it is totally consistent with requirements for findings of fact which have been imposed on other administrative agencies, and will assist the court of appeals in determining the adequacy of factual support for decisions of the division.

The court of appeals, in *Osborn v. Review Board of Indiana Employment Security Division*,³⁰ determined that the procedures utilized by the division to notify claimants of a hearing before a review board met due process requirements, even assuming *arguendo* that the claimant did not receive the notice.³¹ The claimant in *Osborn* did not contest the contention of the agency that the notice was sent by regular mail and that it was not returned undelivered. The court held that the due process clause does not require an ideal system for the administration of justice and that an isolated error is insufficient to strike the entire system of notice.³²

Although it is difficult to quibble with the court's holding on the due process ground, the court's affirmance of the review board's determination against the employee on the merits of the case is more troublesome. *Osborn* was employed as a cocktail waitress and

²⁶*Id.* at 656, (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

²⁷375 N.E.2d at 655-56.

²⁸*Id.* at 658.

²⁹*Id.* at 656-57.

³⁰381 N.E.2d 495 (Ind. Ct. App. 1978).

³¹*Id.* at 499-500.

³²*Id.* at 499.

visited the lounge on a day off to celebrate her husband's birthday. The celebration was apparently successful because Osborn consumed between six and eight small bottles of wine and became intoxicated. She and the bartender were found huddled over a fire extinguisher which had been removed from its normal position and placed in a passageway, the hose having been removed and the pin pulled. Failing to answer her employer's questions about the circumstances, Osborn departed.

The employer discharged Osborn and contested her claim for unemployment compensation upon the ground that she had been discharged for just cause within the meaning of the statute.³³ The statute disqualifies anyone who is discharged for just cause, giving several specific instances of misconduct which meet the definition of a discharge for just cause, and concluding with the catch-all statement, "or for any breach of duty in connection with work which is reasonably owed employer by an employee."³⁴ The court concluded that the review board could reasonably have determined that the fire extinguisher incident fell within this catch-all clause, that Osborn had engaged in conduct which was injurious to her employer, and that such conduct amounted to a breach of duty in connection with work.³⁵

The court observed: "[W]e believe an employer can justifiably expect that its employees will comport themselves in such a manner to preserve the reputation of the employer. Furthermore, this duty may repose on an employee even though she happens to be off-duty."³⁶

The decision appears consistent with authorities from other jurisdictions, and from an employer's viewpoint is rooted in common sense. An employer who personally observes "misconduct" on the part of an employee on the business premises has grounds to consider a discharge to be "for just cause." Nonetheless, it is difficult to reconcile the decision with the statutory language which refers to breach of a duty in connection with "work which is reasonably owed an employer by an employee." Osborn may have been guilty of misconduct, but the misconduct was not in connection with any work she owed her employer.

In a case of first impression in Indiana, the court of appeals approved a determination by the review board that a monthly disability retirement pension received from the federal government was properly considered as income to be deducted from an

³³IND. CODE § 22-4-15-1 (1976).

³⁴*Id.*

³⁵381 N.E.2d at 498.

³⁶*Id.* at 499.

employee's unemployment benefits.³⁷ The employee contended that the pension he was receiving from his prior employer, the federal government, was merely a return of his contribution to the pension plan and that under federal law the return of an employee's contribution is not taxable as income. Under the applicable provision of the Employment Security Act, and in harmony with decisions from other jurisdictions,³⁹ the court concluded that the pension income was properly considered as deductible income, reducing the unemployment compensation. The court determined that the Indiana statutory provision was not inconsistent with the Internal Revenue Code or any other federal statute.⁴⁰

The court also rejected the equal protection argument raised by the employee arising out of the fact that Social Security benefits are not treated as disqualifying income under the Act.⁴¹ Reasonable and justifiable grounds were found to exist for the legislative distinction between the two types of income. The court observed that a government pension is "a form of a contract giving rise to compensation for past services rendered. Social Security, on the other hand, is a federal social insurance program in which the government is spending money in aid of the general welfare. This distinction is convincing."⁴²

B. *Workmen's Compensation and Occupational Diseases Act*

In a three-two decision, the Indiana Supreme Court accepted transfer, reversing and vacating the judgment of the court of appeals in *Calhoun v. Hillenbrand Industries*.⁴³ The claimant felt pain in her lower back while engaged in her normal labor of lifting boxes of parts out of a bin and attaching those parts to table tops, involving weights of up to twenty-five pounds. She left work early that day, and a few days later was so severely disabled that she left work indefinitely. An orthopedic surgeon testified before the industrial board that she had an abnormal enlargement of a disc between two of the lumbar vertebrae, accompanied by abnormal knee and ankle reflexes, and that any kind of bending, lifting, or fall-

³⁷*Fields v. Review Bd. of Ind. Empl. Security Div.*, 385 N.E.2d 1168 (Ind. Ct. App. 1979).

³⁸IND. CODE § 22-4-15-4 (1976).

³⁹385 N.E.2d at 1173-74 (citing *Rogers v. District Unempl. Comp. Bd.*, 290 A.2d 586 (D.C. 1972); *Yeager v. Unemployment Comp. Bd. of Review*, 196 Pa. Super. Ct. 162, 173 A.2d 802 (1961); *Caughey v. Employment Security Dept.*, 81 Wash. 2d 597, 503 P.2d 460 (1972).

⁴⁰385 N.E.2d at 1173.

⁴¹*Id.*

⁴²*Id.* at 1173-74.

⁴³381 N.E.2d 1242 (Ind. 1978), *vacating* 374 N.E.2d 54 (Ind. Ct. App. 1978).

ing motion which exerted pressure on the back in a certain way could cause the type of back injury which the claimant had suffered.⁴⁴ The surgeon further testified that lifting such as that involved in the claimant's normal labor could have caused her back injury.

The industrial board found that

from all of the credible evidence there is no specific time or incident that can be pointed to that would cause the pain in plaintiff's back. Said Full Industrial Board of Indiana finds that plaintiff did not sustain an accident or untoward event arising out of and in the course of her employment.⁴⁵

The court of appeals reversed the industrial board decision on a finding that it was not supportable viewing the evidence in the record most favorably to the board. As the court of appeals viewed the record, there were two reasonable inferences from the facts: either that the claimant's "back was injured while she was performing her normal work duties on the day [during] which the pain commenced or [that] her back injury was attributable to the gradual wear and tear from bending and lifting during the performance of her normal work duties and it manifested itself on the day the pain had commenced."⁴⁶ The Workmen's Compensation Act of 1929 covers personal injury or death "by accident arising out of and in the course of the employment."⁴⁷ Relying upon a series of earlier cases defining "accident,"⁴⁸ the court determined that if the claimant's injury was a gradual development and the pain which she experienced on a particular day was merely a manifestation of a gradually developing injury, then she was entitled to recover.⁴⁹ Viewing the evidence in the light most favorable to the prevailing party, the employer and the board, the court determined that the claimant had in fact suffered an accident arising out of and in the course of her employment, and therefore reversed the decision of the industrial board.⁵⁰

The majority of the supreme court disagreed with the court of appeals primarily on the view taken of the evidence presented by the administrative record. The supreme court considered that "[t]here is no evidence whatsoever in the record that wear and tear

⁴⁴374 N.E.2d at 55.

⁴⁵*Id.*

⁴⁶*Id.* at 56.

⁴⁷IND. CODE § 22-3-2-2 (1976).

⁴⁸*Wolf v. Plibrico Sales & Service Co.*, 158 Ind. App. 111, 301 N.E.2d 756 (1973); *Rankin v. Industrial Contractors, Inc.*, 144 Ind. App. 394, 246 N.E.2d 410 (1969).

⁴⁹374 N.E.2d at 56.

⁵⁰*Id.* at 58.

because of intermittent bending processes in Calhoun's work caused or could have caused the condition she had in her back."⁵¹

As to the definition of an accident for purposes of the Act, the majority held:

It is well settled under our law that in order to show an accident there must be some untoward or unexpected event. It has been further described as an unlooked for mishap or untoward event not expected or designed. It is not sufficient to merely show that a claimant worked for the employer during the period of his life in which his disability arose.⁵²

Justice DeBruler, writing for himself and Justice Hunter in dissent, believed that the industrial board had applied an erroneous view of the legal requirement imposed upon a claimant to prove an injury by accident and that there was no legal requirement for a claimant to prove "a specific time or incident that can be pointed to that would cause the pain in plaintiff's back."⁵³ Because they believed the board had considered the case from an incorrect legal perspective, the dissenting justices would have reversed and remanded to the board.

At first blush, it appears that the supreme court has reverted to a requirement that a claimant for workmen's compensation prove some sudden trauma or violence.⁵⁴ Even so, in the course of its opinion the majority distinguished an earlier court of appeals' decision granting compensation to a claimant based on evidence that a particular apparatus used by the claimant in his employment had produced a trauma to his hands "that had the result over thirteen years of causing a disabling condition to exist."⁵⁵ The supreme court apparently agreed with the conclusion reached by the court of appeals in that case that under such circumstances a claimant was not bound to show that the resultant injury and damage were due to one particular blow which produced the particular injury.

The reversal of the court of appeals opinion may have resulted solely from the supreme court's view of the proper inferences to be drawn from the record, or it may indeed herald a more restrictive view of the proper definition of an accident. Further litigation can be expected to attempt clarification of the issue.

⁵¹381 N.E.2d at 1244.

⁵²*Id.*

⁵³*Id.* at 1245 (DeBruler & Hunter, JJ., dissenting).

⁵⁴*See generally* B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 5.2, at 99 (1950).

⁵⁵381 N.E.2d at 1244 (citing *American Maize Prod. Co. v. Nichiporchik*, 108 Ind. App. 502, 29 N.E.2d 801 (1940)).

A decision of the court of appeals⁵⁶ gives effect to a series of amendments to the Indiana Workmen's Compensation Act which have gradually expanded the period of time for which continuing medical expenses can be awarded by the industrial board.⁵⁷

The claimant suffered a severe back injury in the course of his duties as an employee, resulting in permanent partial impairment of ninety percent. His condition required medical services and supplies on a continuing basis. The industrial board held that the claimant was entitled to 450 weeks of compensation for his impairment, but also incorporated into its award a statement that the employer's liability to pay for medical expenses and supplies "shall terminate on August 12, 1983, and that defendant shall not be responsible for any payments beyond said date."⁵⁸ The board specifically stated that it was without jurisdiction to order continuing medical payments beyond that date.⁵⁹

The court of appeals affirmed the award of 450 weeks of compensation payments, but concluded that the findings by the industrial board regarding termination of benefits in 1983 "are mere unenforceable surplusage," based upon a review of the appropriate limitation periods imposed by the Act.⁶⁰ As the court interpreted those limitation provisions, a claimant who has been granted payments for partial impairment may seek a modification of the award any time within one year from the last day for which compensation was paid. No limitation is placed on the number of modifications which can be sought based upon an increase in permanent partial impairment or a continuation of medical expenses.⁶¹ The court's decision properly interprets the amended provisions of the Act, and will permit full relief to claimants under the Act, as intended by the legislature.

The 1979 session of the Indiana General Assembly adopted several amendments to the Workmen's Compensation Act modifying several of the statutory benefit periods and maximum compensation amounts, and included prosthodontics among the appliances which an employer is required to provide to an injured employee. The amendments became effective July 1, 1979.⁶²

⁵⁶Gregg v. Sun Oil Co., 388 N.E.2d 588 (Ind. Ct. App. 1979).

⁵⁷*Id.* at 590-91 (construing Workmen's Compensation Act of 1929 Amendments, Pub. L. No. 227, § 1, 1979 Ind. Acts 1014 (codified at IND. CODE § 22-3-3-4 (Supp. 1979))).

⁵⁸388 N.E.2d at 589.

⁵⁹*Id.*

⁶⁰*Id.* See IND. CODE §§ 22-3-3-4, -27 (Supp. 1979).

⁶¹388 N.E.2d at 590.

⁶²Workmen's Compensation Act of 1929 Amendments, Pub. L. No. 227, §§ 1-6, 1979 Ind. Acts 1014 (codified at IND. CODE §§ 22-3-3-4 to -13 (Supp. 1979)).

C. Public Employees

Continuing a trend observable for several years in the state and federal courts, there were a number of significant decisions involving public employees. Several of those cases dealt with demotions. The court of appeals held that an ordinance adopted by the City of Whiting, which authorized demotion of policemen only for violation of written rules and regulations adopted by the Whiting Board of Public Works or Police Chief,⁶³ gave rise to an expectation on the part of each policeman that he would continue in his rank unless he violated one of the written rules and regulations.⁶⁴ Consequently, the policeman had a property interest, or legitimate claim of entitlement, which was protected by the due process clause of the fourteenth amendment to the United States Constitution. In the circumstances of the case, due process required sufficient cause for demotion to be established, with charges made and provided to the employee, notice given, and a hearing held prior to demotion.⁶⁵ The municipal ordinance gave rise to due process guarantees despite the fact that the then applicable state statute had been construed as not supporting a claim of entitlement or the basis for a property interest.⁶⁶

The policemen involved had been summarily demoted by a letter from the newly installed Mayor Grenchik, who testified that he did not recall the city ordinance when he wrote the letters of demotion.⁶⁷ The court held that the policeman had been demoted in violation of procedural due process and that "[t]he proper remedy for a policeman who has been improperly demoted is reinstatement to the rank he held prior to demotion, and payment of the salary differential from the date of demotion."⁶⁸ Local ordinances mean what they say and may also give rise to constitutional guarantees unimagined by the city fathers.

In the absence of a local ordinance, the court of appeals in *Morris v. City of Kokomo*,⁶⁹ determined that a Kokomo Assistant Fire Chief and District Fire Chief, who had been demoted to the rank of private, did not have a property interest or a liberty interest which

⁶³Whiting, Ind., Ordinance 1057 (July 2, 1962), as amended by Ordinance 1083 (Nov. 1, 1965).

⁶⁴State v. Grenchik, 379 N.E.2d 997, 1001-02 (Ind. Ct. App. 1978).

⁶⁵*Id.* at 1002.

⁶⁶See Smulski v. Conley, 435 F. Supp. 770, 773 (N.D. Ind. 1977); Jenkins v. Hatcher, 322 N.E.2d 117, 119 (Ind. Ct. App. 1975) (construing IND. CODE § 18-1-11-3 (1976)).

⁶⁷379 N.E.2d at 1000.

⁶⁸*Id.* at 1002.

⁶⁹381 N.E.2d 510 (Ind. Ct. App. 1978). But see Greenberg, *supra* note 1, at 49.

had been implicated, and thus were not entitled to notice and a hearing under the due process clause.

Substantively, however, the fire officials also alleged that their demotions had been taken in retaliation for their exercise of constitutionally protected rights of freedom of speech and association, in that they had not supported the incumbent mayor's bid for reelection. The trial court had dismissed this count of the complaint together with the other counts. The court of appeals reversed the dismissal based upon the United States Supreme Court decision in *Elrod v. Burns*.⁷⁰ The Supreme Court there ruled that a non-policy making, non-confidential public employee could not be discharged from a job which he had been satisfactorily performing solely upon the ground of his political beliefs. The decision was widely regarded nationally as signaling the demise of the patronage system of public employment.

The court of appeals gave valuable instruction as to the relative burdens borne by the parties in determining whether the demotions were unconstitutional. A plaintiff bears the burden of proving that the constitutionally protected activity was "a motivating force behind the demotions."⁷¹ Assuming that burden is met, a city may yet escape liability in either of two ways.⁷²

First, if a defendant city proves by a preponderance of the evidence that the decision to demote a plaintiff was justified by reasons independent of the constitutionally protected conduct, although the constitutionally protected conduct may have been a motivating factor, there is no liability, under the Supreme Court decision in *Mount Healthy City School District Board of Education v. Doyle*.⁷³

Second, a defendant city could escape liability by showing a "paramount interest" justifying encroachment of first amendment freedoms, including a showing that an employee was in a confidential or policy-making position.⁷⁴ Because the complaint in *Morris* had been dismissed by the trial court, no factual record was available to the appellate court demonstrating whether these plaintiffs fell within either of the categories.

The court specifically considered the question whether *Elrod* and its progeny were applicable to demotions and other adverse job actions short of discharge. Accurately noting that the constitutional danger is that the employees will be coerced into affiliating with a

⁷⁰427 U.S. 347 (1976).

⁷¹381 N.E.2d at 517.

⁷²*Id.*

⁷³*Id.* (citing *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)).

⁷⁴381 N.E.2d at 517.

particular party candidate out of a threat of adverse job action, the court concluded that "the prohibited result is the same whether the threat is demotion or discharge—a significant impairment of first amendment freedoms."⁷⁵

Although the result in the case would be predictable based upon the proper interpretation of the United States Supreme Court decisions,⁷⁶ the opinion of the court of appeals is nevertheless highly significant because it will bring home to Indiana public employees, and to the Indiana judiciary, the viability and force of the first amendment protections in the area of patronage employment. Presumably the same result would apply to adverse job actions other than demotion, such as punitive transfers, assignment to unfavorable work stations, refusals of promotion, and any other adverse job action. The existence of the rights recognized by the court in *Morris*, together with possible municipal liability for damages and attorney fees, will bring a speedy end to the time-favored patronage system in Indiana.

Two decisions of the court of appeals interpreted the Collective Bargaining for Teachers Act⁷⁷ and the authority of the Indiana Education Employment Relations Board (IEERB), which administers the Act. *Board of School Trustees of Worthington-Jefferson Consolidated School Corp. v. IEERB*⁷⁸ may well be destined for an award for the number of opinions generated in the court of appeals.⁷⁹ The case involved three public school teachers who were dismissed from their positions by the Worthington-Jefferson School Corporation in the spring of 1974. The teachers filed unfair labor practice charges under the Act with the IEERB alleging that the school board had committed an unfair practice by dismissing them for exercising rights conferred by the Act, in particular the right to organize for collective bargaining. A hearing officer and the full IEERB found that the teachers had in fact been discharged because of their collective bargaining activities and that the school board had committed an unfair practice in violation of the Act.⁸⁰ The IEERB

⁷⁵*Id.* at 518. See also *McGill v. Board of Educ. of Pekin Elementary School Dist. No. 108*, 602 F.2d 774 (7th Cir. 1979), in which the court held that a retaliatory transfer can trigger first amendment rights, whether or not the employee held a protected property interest in a particular position. The court stated: "The test is whether the adverse action taken by the defendants is likely to chill the exercise of constitutionally protected speech." *Id.* at 780.

⁷⁶427 U.S. 347 (1976).

⁷⁷IND. CODE §§ 20-7.5-1-1 to -14 (1976).

⁷⁸375 N.E.2d 281 (Ind. Ct. App. 1978).

⁷⁹The author was counsel of record for the three teachers in the Worthington-Jefferson proceeding.

⁸⁰*IEERB v. Board of School Trustees of Worthington-Jefferson Consol. School Corp.*, 355 N.E.2d 269, 271 (Ind. Ct. App. 1976) (construing IND. CODE § 20-7.5-7(a)(1)(3) (1976)).

issued a final order requiring the school board to reinstate the teachers with back pay. On a petition for judicial review under the Administrative Adjudication Act,⁸¹ the trial court concluded that the factual record did not support the IEERB determination and that the school board had not committed an unfair practice.⁸²

In its first opinion, the court of appeals reversed the trial court determination, concluding that the trial court had applied an erroneous standard of review of the agency proceedings and that the administrative determination must be approved if it was supported by "any substantial evidence" in the record.⁸³ Applying the appropriate standard of review itself, the court concluded: "The record before the IEERB is replete with extensive testimony to support the conclusion that the teachers were discharged for their union activities."⁸⁴ The court noted that the school board had attempted to raise an issue as to the power of the IEERB to order the reinstatement of a teacher in the circumstances of the case. Because the trial court had made no finding upon the matter, the court of appeals found that the question was not properly before it, and reversed and remanded for proceedings not inconsistent with the opinion.⁸⁵

On remand, the trial court determined that the IEERB did have the power, under the Act, to order the reinstatement of a teacher whose dismissal had resulted from the exercise of activities protected by the Act.⁸⁶ This determination of the trial court was in turn appealed to the court of appeals, which issued its second full opinion in May 1978.⁸⁷ The court first rejected the school board's contention that the matter should be remanded to the IEERB, under *Mount Healthy City School District Board of Education v. Doyle*,⁸⁸ to determine whether a preponderance of the evidence would show that the three teachers would have been meritoriously discharged even if they had not engaged in protected activities. The court noted that the IEERB had specifically found that the school board's stated justification for firing the teachers was "mere pretext." The court held that the only reasonable inference from the findings was that the school board did not have justifiable reason to dismiss the three teachers, and that consequently whether it was required to do so or not, the IEERB had met the test set forth in *Mount Healthy*.⁸⁹

⁸¹IND. CODE §§ 4-22-1-1 to -4-1 (1976).

⁸²355 N.E.2d at 270-71.

⁸³*Id.* at 272-73.

⁸⁴*Id.* at 273.

⁸⁵*Id.* at 274.

⁸⁶375 N.E.2d 281, 283 (Ind. Ct. App. 1978).

⁸⁷*Id.* at 281.

⁸⁸429 U.S. 274 (1977).

⁸⁹375 N.E.2d at 284.

Turning to the issue of the authority of the IEERB to order reinstatement, the court of appeals agreed with the school board contention that the IEERB is "merely a fact finding body and has no power to issue a final order to a school board to reinstate a teacher."⁹⁰ The remedial powers of the IEERB are set out in section 11 of the Act.⁹¹ The section does not specifically contain a grant of authority to the IEERB to order the reinstatement of teachers, and the court refused to imply such a power in the absence of a specific grant. Because it found no ambiguity in the statutory language, the court did not utilize any of the standard rules of statutory construction in reaching its result. It made no reference to the intent of the legislature or the remedial purpose of the Act itself. The court considered the absence of a specific grant of power to be conclusive.⁹²

However, the court recognized that a teacher who is found to have been dismissed for having engaged in a protected activity is entitled to a remedy, and devised a procedure which culminates in a determination by a trial court. If the trial court concludes that the factual determinations of the IEERB are supported by substantial evidence in the record, then the court may fashion a remedy "to cure whatever injustice has taken place" based upon the IEERB findings of fact.⁹³

The court remanded the cause to the trial court again, with instructions that the trial court "enter an original order of mandatory relief reinstating" the three teachers and give "whatever other relief it deems to be just and equitable."⁹⁴

The unwillingness of the court of appeals to consider the legislative intent revealed by the entire body of the Collective Bargaining Act has seriously, though not fatally, interfered with the purpose of the legislation. Now a teacher who is fired for having

⁹⁰*Id.*

⁹¹IND. CODE § 20-7.5-1-11 (1976) provides:

Unfair practices shall be remediable in the following manner:

(a) Any school employer or any school employee who believes he is aggrieved by an unfair practice may file a complaint under oath to such effect, setting out a summary of the facts involved and specifying the section of this chapter . . . alleged to have been violated.

(b) Thereafter, the board shall give notice to the person or organization against whom the complaint is directed and shall determine the matter raised in the complaint, and appeals may be taken in accordance with [IND. CODE §§ 4-22-1-1 to -30 (1971)]. Testimony may be taken and findings and conclusions may be made by a hearing examiner or agent of the board who may be a member thereof. The board, but not a hearing examiner or agent thereof, may enter such interlocutory orders after summary hearing as it deems necessary in carrying out the intent of this chapter.

⁹²375 N.E.2d at 284-85.

⁹³*Id.* at 285.

⁹⁴*Id.*

engaged in the very practices the Act was intended to foster—collective bargaining—has no efficient administrative process available for relief. Under the court's interpretation of the correct procedure, the teacher must go first to the IEERB to have the facts determined, and is then compelled to initiate judicial action, of some nature, to seek a remedy. Because the IEERB was created by the general assembly to exercise judgment, wisdom, and expertise in the area of personnel relations between teachers and school boards,⁹⁵ one would have thought the IEERB would have been best suited to fashion an appropriate remedy for unfair practices.

The appellees sought rehearing, and in September 1978 the court issued a third opinion denying the petition for rehearing, but offering additional guidance to the trial court as to the appropriate remedy.⁹⁶ The opinion on rehearing focused primarily upon the appellees' argument that use of the word "remediable" in section 11 of the Act⁹⁷ gave evidence of a legislative intent that the IEERB was to have the authority to redress a wrong. The court rejected the argument, suggesting that the word "remedy" could apply to final determinations of fact as well as to orders of specific relief.⁹⁸ Considering legislative intent for the first time, the court determined that the absence of a specific grant of power to order reinstatement of dismissed teachers was clear indication that the legislature did not wish to give that power.

As to the appropriate remedy to be ordered by the trial court, the court of appeals, having already ordered reinstatement, gave the following guidance: "In order to avoid future confusion we now state the trial court has the power to award back pay, and from the record with which we have been presented such would appear to be merited."⁹⁹

On April 13, 1979, the trial court on remand, acting pursuant to the instructions contained in the opinion of May 1978, issued an order requiring the school corporation to reinstate the three teachers at the commencement of the 1979-80 school year. Despite the clear instruction of the court of appeals on remand, the school board filed a petition for a writ of mandate or prohibition, alleging that the trial court had exceeded its jurisdiction and violated the directions given by the court of appeals in ordering reinstatement. In a fourth full opinion, the court of appeals rejected the school

⁹⁵Indiana Educ. Empl. Relations Bd. v. Benton Community School Corp., 266 Ind. 491, 365 N.E.2d 752, 756 (1977).

⁹⁶Board of School Trustees of Worthington-Jefferson Consol. School Corp. v. IEERB, 380 N.E.2d 93 (Ind. Ct. App. 1978).

⁹⁷IND. CODE § 20-7.5-1-11 (1976).

⁹⁸380 N.E.2d at 95.

⁹⁹*Id.*

board's argument, stating that it was the intent of the court of appeals that the three teachers be reinstated.¹⁰⁰ The matter was again remanded to the trial court for a hearing on the amount of back pay.¹⁰¹

Thus, the three teachers involved in the Worthington-Jefferson litigation appear destined to receive a full and adequate remedy for the unfair practices committed against them five years ago. They have been ordered reinstated, and have been granted back pay. Nonetheless, the procedure devised by the court of appeals for future teachers who are dismissed in violation of the Act will necessarily be time consuming, expensive, and cumbersome. To that extent, collective bargaining by public employees has been thwarted by judicial intervention.

The court of appeals decided an additional case involving a dismissed teacher and the IEERB, in *IEERB v. Board of School Trustees of Baugo Community Schools*.¹⁰² The IEERB had found that the teacher was illegally dismissed in 1974 because of her affiliation and support of a teachers' negotiation group, the Baugo Education Association.¹⁰³ The trial court reversed the IEERB decision on judicial review. The court of appeals determined that the trial court had employed an improper standard of review and had utilized earlier appellate opinions, decided before the passage of the Collective Bargaining Act, in reversing the IEERB.¹⁰⁴

Reviewing the record to determine whether there was substantial evidence to support the IEERB factual determinations, as the court had done in the first Worthington-Jefferson case, the court concluded: "[W]e do note that some evidence was present which supported the IEERB determination that Poyser was discharged due to her BEA activities. The trial court should not have substituted its decision for that of the IEERB."¹⁰⁵ The matter was remanded to the trial court for further proceedings.¹⁰⁶

¹⁰⁰State *ex rel.* Board of Trustees v. Knox Circuit Court, 390 N.E.2d 232, 234 (Ind. Ct. App. 1979).

¹⁰¹On October 11, 1979, the Knox Circuit Court issued Findings of Fact, Conclusions of Law, and an Order requiring the school corporation to pay the three teachers a total of \$103,073 in back pay, plus simple interest at eight percent from the date of injury. The court ordered that the teachers be given credit on the salary schedule for the five years they were ousted from the school corporation, together with other ancillary relief. Board of School Trustees of Worthington-Jefferson Consol. School Corp. v. IEERB, Cause No. CC75-77 (Knox Cir. Ct. Oct. 11, 1979).

¹⁰²377 N.E.2d 414 (Ind. Ct. App. 1978).

¹⁰³*Id.* at 415.

¹⁰⁴*Id.* at 416-17.

¹⁰⁵*Id.*

¹⁰⁶*Id.* at 417.

In legislative developments, the statutes creating the status of semi-permanent teacher and permanent teacher¹⁰⁷ have been amended to comply with the Federal Age Discrimination in Employment Act.¹⁰⁸ Under the amendments, there is no upper age limit for a teacher to retain status as a semi-permanent teacher; a permanent or tenured teacher can retain that status until age seventy-one. Consistent amendments were made to the Teachers' Retirement Act.¹⁰⁹

The Indiana Age Discrimination Act¹¹⁰ was amended to increase the maximum age of coverage from sixty-five years to seventy years. Additionally, the definition of "employer" in the Act was amended, excluding any person or governmental entity which is subject to the Federal Age Discrimination in Employment Act.¹¹¹ Thus, employers will not be subject to dual coverage for age discrimination.

The opportunity of a public school board to comment upon the status of negotiations with the exclusive representative of the teachers was increased by an amendment to the Indiana Open-Door Law.¹¹² A new section was added to that statute permitting a school board to inform the public of the status of collective bargaining by release of factual information and by expression of opinion based upon factual information.¹¹³

¹⁰⁷IND. CODE § 20-6.1-4-9, -9.5 (Supp. 1979).

¹⁰⁸29 U.S.C. §§ 621-634 (1976), *as amended by* Act of Apr. 6, 1978, Pub. L. No. 95-256, 92 Stat. 189.

¹⁰⁹IND. CODE § 21-6.1-5-1 (Supp. 1979), *as amended by* Act of Apr. 9, 1979, Pub. L. No. 206, § 2, 1979 Ind. Acts 951.

¹¹⁰IND. CODE § 22-9-2-6 (Supp. 1979), *as amended by* Act of Apr. 9, 1979, Pub. L. No. 206, § 3, 1979 Ind. Acts 951.

¹¹¹29 U.S.C. §§ 621-634 (1976).

¹¹²Act of Apr. 9, 1979, Pub. L. No. 39, § 4, 1979 Ind. Acts 161 (codified at IND. CODE § 5-14-1.5-6.5 (Supp. 1979)).

¹¹³*Id.*

XII. Products Liability

Frank J. Galvin, Jr.*

*Ortho Pharmaceutical Corp. v. Chapman*¹ was probably the most significant case decided during this year's survey period. The decision may set new precedents in the area of strict liability, particularly with respect to prescription drugs and comment k of section 402A of the *Restatement (Second) of Torts*.²

A. The Duty to Warn: Prescription Drugs

In *Ortho*, the court found that comment k of section 402A of the *Restatement (Second) of Torts*³ sets forth a recognized exception to strict liability with respect to the duty to warn for unforeseeable risks and dangers associated with prescription drugs, vaccines, and other unavoidably unsafe products.⁴ The plaintiff had instituted a cause of action against the defendant Ortho Pharmaceutical Corporation for internal injuries suffered as a result of taking an oral contraceptive manufactured by the defendant. The plaintiff's claim for liability was founded upon theories of negligence, express or implied warranty, and strict liability. On appeal, the plaintiff did not allege that her injury was the result of defective design or manufacture of the contraceptive, but rather claimed that the "lack of adequate warnings rendered it unreasonably dangerous."⁵ The plaintiff had argued that comment k dealt with products that were an absolute public necessity.⁶ The court of appeals, however, found that com-

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¹388 N.E.2d 541 (Ind. Ct. App. 1979).

²RESTATEMENT (SECOND) OF TORTS § 402A, comment k (1965).

³Comment k states in pertinent part:

Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician.

Id.

⁴388 N.E.2d at 545 (citing *Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 425 (2d Cir. 1969)).

⁵388 N.E.2d at 545.

⁶*Id.*

ment k posed a more fundamental question—"whether marketing of the product is justified in light of the known risks."⁷ A decision of this nature involves balancing the product's public utility with the risks and dangers inherent in the use of the product.⁸ The court noted, however, that when such balancing justifies marketing a product, a manufacturer should provide proper warnings informing the user of the risk of harm.⁹

The court initially held that with respect to prescription drugs a duty to warn does not arise "until the manufacturer knows or should know of the risk"¹⁰ presented in the use of its product.¹¹ The court reasoned that a manufacturer "cannot be required to warn of a risk unknown to science"¹² and, therefore, can only be held responsible for that knowledge held by experts in the particular field during the period in which the plaintiff uses the product in question.¹³

⁷*Id.*

⁸*Id.* The underlying rationale for this holding was set forth in *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, (5th Cir. 1973), cited in 388 N.E.2d at 546, in which the court stated:

Strict liability may not always be appropriate in such cases because of the important benefits derived from the use of the product. This is especially so with respect to new drugs that are essential in treating disease but involve a high degree of risk. It may also be so with respect to other commercial products possessing both unparalleled utility and unquestioned danger. As a practical matter, the decision to market such a product requires a balancing of the product's utility against its known or foreseeable danger.

493 F.2d at 1088-89. Professor Wade proposes a more complex method for determining whether the product's utility outweighs the dangers:

Factors involved in making this determination include, among others, the following: (1) [T]he usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 17 (1965).

⁹388 N.E.2d at 546 (citing *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076). In *Borel*, the court decided that the ultimate consumer should be allowed to make his own determination about whether use of the product is justified in light of the known risks.

¹⁰388 N.E.2d at 548.

¹¹*Id.*

¹²*Id.*

¹³*Id.* at 549. The court found this conclusion was supported, in part, by a portion of comment k that states:

"It is also true in particular of many new or experimental drugs as to which, because of *lack of time and opportunity for sufficient medical experience*, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug

The *Ortho* court recognized that the authorities are split with respect to conditioning the duty to warn on the manufacturer's knowledge.¹⁴ Some courts have *assumed* knowledge;¹⁵ others, including the *Ortho* court, have found that it would be unreasonable to hold a manufacturer liable for unforeseeable harm simply because the manufacturer had supplied the public with a product of substantial utility.¹⁶ The criticism of this latter approach has been that it "shifts the emphasis away from the condition of the product (strict liability) and back to the reasonableness of the manufacturer's conduct (negligence)."¹⁷

It is apparent that the *Ortho* court's requirement of knowledge of the risk on the part of the drug manufacturer before the duty to warn will arise narrows the difference between strict liability and negligence.¹⁸ The court in *Ortho* observed that the language in *Fort Wayne Drug Co. v. Flemion*,¹⁹ which involved a negligent breach of the duty to warn, accurately described the theory of an action under section 402 with respect to prescription drugs.²⁰ In *Fort Wayne Drug*, the court held that "[i]t is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result."²¹

Although the standard and proof necessary to recover are identical under both theories, there is a theoretical difference between negligent breach of the duty to warn and strict liability based on the absence of proper warnings. The *Ortho* court found that section 402A required an additional conclusion of law beyond a finding of negligence.²² In addition to finding a manufacturer negligent in failing to adequately warn of the risks present, the conclusion must also be drawn that the product was in a defective and unreasonably dangerous condition. Because this conclusion does not require an ad-

notwithstanding a *medically recognizable risk*."

Id. at 547 (quoting RESTATEMENT (SECOND) OF TORTS § 402A, comment k (1965)).

¹⁴388 N.E.2d at 546.

¹⁵*See, e.g.,* Hamilton v. Hardy, 37 Colo. App. 375, 549 P.2d 1099 (1976); Johnson v. Clark Equip. Co., 274 Or. 403, 547 P.2d 132 (1976); Little v. PPG Indus., Inc., 579 P.2d 940 (Wash. App. 1978). *See also* Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

¹⁶388 N.E.2d at 547-48.

¹⁷Little v. PPG Indus., Inc., 579 P.2d at 946, *quoted in* 388 N.E.2d at 547.

¹⁸*See* 388 N.E.2d at 550.

¹⁹93 Ind. App. 40, 175 N.E. 670 (1931).

²⁰388 N.E.2d at 551.

²¹93 Ind. App. at 47, 175 N.E. at 672 (quoting Wellington v. Downer Kerosene Oil Co., 104 Mass. 64 (1870)).

²²388 N.E.2d at 551.

ditional finding of fact, however, the aforementioned comparison of the duty to warn in a negligence or a strict liability claim is, in effect, a "distinction without a difference."²³

B. Adequacy of Warnings

The court in *Ortho* examined the standards governing the adequacy of a warning and found that a warning must be reasonable under the facts and circumstances of each case.²⁴ The court then considered several methods of determining reasonableness and found that, as a practical matter, the "reasonableness" of a warning is decided by resort to negligence concepts.²⁵

The court in *Spruill v. Boyle-Midway, Inc.*²⁶ stated that "[i]f a warning of the danger is given and this warning is of a character reasonably calculated to bring home to the reasonably prudent person the nature and extent of the danger, it is sufficient to shift the risk of harm from the manufacturer to the user."²⁷ Similarly, the court in *Sterling Drug, Inc. v. Yarrow*²⁸ found that what is reasonable depends upon the nature and gravity of the dangers present.²⁹ More specifically, in *Bituminous Casualty Corp. v. Black & Decker Manufacturing Co.*,³⁰ it was held that for a warning to be adequate it must

be in such form that it could reasonably be expected to catch the attention of the reasonably prudent man in the circumstances of its use [and] . . . be of such a nature as to be comprehensible to the average user and to convey a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person.³¹

The *Bituminous* court further noted that a warning should have the requisite "degree of intensity" to sufficiently alarm the ordinary user and allow him to take the necessary precautions.³²

Ortho concluded that a proper warning must be adequate in its factual content, its expression of facts, and in the manner in which it is communicated.³³

²³*Smith v. E.R. Squibb & Sons, Inc.*, 69 Mich. App. 375, 384, 245 N.W.2d 52, 56 (1976), *quoted in* 388 N.E.2d at 551.

²⁴388 N.E.2d at 553.

²⁵*Id.* at 552-53.

²⁶308 F.2d 79 (4th Cir. 1962).

²⁷*Id.* at 85.

²⁸408 F.2d 978 (8th Cir. 1969).

²⁹*Id.* at 994, *cited in* 388 N.E.2d at 562.

³⁰518 S.W.2d 868 (Tex. Ct. App. 1974).

³¹*Id.* at 872-73, *quoted in* 388 N.E.2d at 552.

³²518 S.W.2d at 873.

³³388 N.E.2d at 552.

C. Ultimate Users

The court in *Ortho* noted a well-recognized second limitation on the liability of manufacturers with respect to the duty to warn for prescription drugs³⁴ and found that because prescription drugs cannot be obtained without a physician's authorization, a manufacturer's duty to warn extends only to those who would prescribe such medicine, not to the actual user.³⁵ The *Ortho* court, examining *Reyes v. Wyeth Laboratories*,³⁶ noted the rationale for this exception:

"Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug, as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, an individualized medical judgment bottomed on a knowledge of both patient and palliative."³⁷

Thus, the ultimate user's safety is placed in the hands of the physician. If the manufacturer's warnings fully apprise the physician of the risks involved, the manufacturer may assume that the doctor will exercise well-reasoned and well-informed judgment on behalf of the patient.³⁸

D. Unreasonably Dangerous and Defective Drugs

Under section 402A of the *Restatement (Second) of Torts*, a manufacturer is subject to liability to an ultimate consumer injured by a product sold "in a defective condition unreasonably dangerous."³⁹ The *Ortho* court found comment k of section 402A

³⁴*Id.* at 548.

³⁵*Id.* See *Smith v. E.R. Squibb & Sons, Inc.*, 69 Mich. App. 375, 245 N.W.2d 52 (1976); *McEwen v. Ortho Pharmaceutical Corp.*, 270 Or. 375, 528 P.2d 522 (1974); *Terhune v. A.H. Robins Co.*, 90 Wash. 2d 9, 577 P.2d 975 (1978).

³⁶498 F.2d 1264 (5th Cir. 1974).

³⁷388 N.E.2d at 549 (quoting 498 F.2d at 1276).

³⁸The court in *Reyes* recognized, however, that when there is no intervening physician to make an informed judgment on behalf of the ultimate consumer, "it is the responsibility of the manufacturer to see that warnings reach the consumer, either by giving warning itself or by obligating the purchaser to give warning." *Id.* (quoting *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121, 131 (9th Cir. 1968)).

³⁹RESTATEMENT (SECOND) OF TORTS § 402A (1965). See IND. CODE § 33-1-1.5-3(a) (Supp. 1979). Although the *Restatement* speaks in terms of "sellers," the manufacturers of defective and unreasonably dangerous products are, nevertheless, included. See RESTATEMENT (SECOND) OF TORTS § 402A, comment f (1965).

especially significant in determining the relationship between the meaning of "defective condition unreasonably dangerous" and prescription drugs.⁴⁰ Comment k states that unavoidably unsafe products—especially drugs and vaccines—are not unreasonably dangerous or defective when properly prepared and accompanied by adequate directions and warnings.⁴¹ The court followed this reasoning and thus interpreted comment k to mean, with respect to drugs, that unavoidably unsafe or dangerous products are per se defective and unreasonably dangerous when not accompanied by proper warnings.⁴² Generally, however, a product is not unreasonably dangerous for purposes of section 402A unless it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."⁴³

The court in *Reyes* found that the presence of a dangerous virus in a particular vaccine did not necessarily render the product "unreasonably dangerous" under section 402A.⁴⁴ Although the court acknowledged that the vaccine may have constituted an "unavoidably unsafe product" within the definition of comment k, it further noted that "in terms of the user's interests, a product is 'unreasonably dangerous' only when it is 'dangerous to an extent beyond that contemplated by the ordinary consumer.'" ⁴⁵

Burton v. L.O. Smith Foundry Products Co.,⁴⁶ displayed reasoning similar to *Reyes* and contrary to the *Ortho* approach. The *Bur-*

⁴⁰388 N.E.2d at 545-46.

⁴¹RESTATEMENT (SECOND) OF TORTS § 402A, comment k (1965). For the text of comment k, see note 3 *supra*.

⁴²388 N.E.2d at 552. *But see* Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 32 (1973); Wade, *supra* note 8, at 14-15. In *Reyes*, the court found that "defective condition" has no independent meaning apart from "unreasonably dangerous." 498 F.2d at 1272-73.

⁴³RESTATEMENT (SECOND) OF TORTS § 402A, comment i (1965).

⁴⁴498 F.2d at 1273.

⁴⁵*Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 402A, comment i (1965)). Of course, an injured consumer will normally be barred from recovery when he voluntarily uses the product with full knowledge of the dangers present. *See* comment n of § 402A, which states in pertinent part:

The form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

See also Meadowlark Farms, Inc. v. Warken, 376 N.E.2d 122 (Ind. Ct. App. 1978). In *Meadowlark*, the court found that a plaintiff impliedly assumes those risks of which he has actual knowledge and appreciation. *Id.* at 133. In addition, the plaintiff is presumed to have actual knowledge of those risks and dangers expressly contracted for. *Id.*

⁴⁶529 F.2d 108 (7th Cir. 1976).

ton court found that a duty to warn is required only in those instances in which it can reasonably be assumed that the ordinary consumer would be "ignorant of the facts which a warning would communicate."⁴⁷ The court, citing *Posey v. Clark Equipment Co.*,⁴⁸ found that cautionary instructions and warnings are not required when the ordinary user of such a product would normally realize the danger without a warning.⁴⁹

In *Burton*, the court considered the issue whether the supplier of a highly flammable compound was under a duty to warn of the combustible risks posed by the presence of kerosene in the compound. The court recognized that a product may be considered defective and unreasonably dangerous under section 402A when the manufacturer fails to warn of the dangers or risks involved in the use of the product, even though the product may be "virtually faultless in design, material, and workmanship,"⁵⁰ an approach similar to *Ortho*. The court held, however, that because one can reasonably expect the ordinary user of kerosene to be aware of its combustible propensities, the manufacturer was under no duty to warn of that danger. The manufacturer's sole duty was to make known those risks involved in the use of the product which were dangerous but not obvious.⁵¹

It is noteworthy that the court in *Ortho* recognized similarities between section 402A and section 388 of the *Restatement (Second) of Torts*,⁵² which is basically founded upon the "common law cause of action for failure to exercise reasonable care to inform users of the dangerous qualities of a chattel."⁵³ Section 388(a) indicates that a supplier is subject to liability for injuries suffered by users of that chattel if the supplier "knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied."⁵⁴ The language of section 388(a) is similar to that used by the *Ortho* court in drawing a distinction with respect to prescription drugs. Section 388(b), however, states that a supplier of goods will only be liable if he "has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition,"⁵⁵ an

⁴⁷*Id.* at 111.

⁴⁸409 F.2d 560 (7th Cir. 1969), *cited in* 529 F.2d at 111.

⁴⁹529 F.2d at 111.

⁵⁰*Id.* (citing *Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820 (Ind. Ct. App. 1975), *rev'd on other grounds*, 358 N.E.2d 974 (Ind. 1976)).

⁵¹529 F.2d at 111-12.

⁵²RESTATEMENT (SECOND) OF TORTS § 388 (1965).

⁵³388 N.E.2d at 549 (citing *Stapinski v. Walsh Constr. Co.*, 383 N.E.2d 473 (Ind. Ct. App. 1978)).

⁵⁴RESTATEMENT (SECOND) OF TORTS § 388(a) (1965), *quoted in* 388 N.E.2d at 549 n.7.

⁵⁵RESTATEMENT (SECOND) OF TORTS § 388(b) (1965), *quoted in* 388 N.E.2d at 549 n.7.

approach more closely analogous to the *Reyes* and *Burton* decisions than to *Ortho*.

The court in *Stapinski v. Walsh Construction Co.*⁵⁶ held that with respect to section 388, the seller had no duty to warn of *all* dangers in a product.⁵⁷ The seller should only be required to make the buyer aware of those dangers the reasonable person would not discover. The court stated: "Where a purchaser is aware or should be aware that an article is dangerously defective, and the purchaser uses the article . . . , the liability for injuries to third persons therefore rests upon the purchaser"⁵⁸

The *Ortho* court's reference to section 388, combined with the holdings in *Reyes* and *Burton*, suggest that a manufacturer need not provide warnings when the ordinary user knows or should have known of the product's dangerous propensities. The court's language in *Ortho*, however, does not lend itself to the interpretation that this test of "unreasonably dangerous," arising under comment i of section 402A, will be the determining factor under strict liability when comment k and prescription drugs are considered. Instead, the *Ortho* court held that a dangerous drug must be accompanied by proper warnings to be free from defect, regardless of whether the danger would be one contemplated by the ordinary consumer who purchases it.

The "ordinary consumer" interpretation would certainly lessen the manufacturer's duty to warn. This conclusion appears more convincing in view of the court's holding in *Ortho* that a duty to warn involving prescription drugs should extend only to members of the medical profession,⁵⁹ who as the consumers to whom the duty to warn is owed, can reasonably be expected to know more dangers without the benefit of warning. Thus, fewer products would be unreasonably dangerous when not accompanied by proper warnings.⁶⁰ It is foreseeable, though, that conflicts will arise concern-

⁵⁶383 N.E.2d 473 (Ind. Ct. App. 1978).

⁵⁷*Id.* at 477.

⁵⁸*Id.*

⁵⁹388 N.E.2d at 548.

⁶⁰A different result was reached in *Mueller & Co. v. Corley*, 570 S.W.2d 140 (Tex. Ct. App. 1978). See also *Helicoid Gage Div. of Am. Chain & Cable Co. v. Howell*, 511 S.W.2d 573, 578 (Tex. Ct. App. 1974). In *Mueller*, the defendants petitioned the court to instruct the jury that the term "unreasonably dangerous" would mean the product was dangerous to an extent not contemplated by the ordinary physician. 570 S.W.2d at 145. The product in question was a silicone breast prosthesis which had ruptured after its implant accompanying a subcutaneous mastectomy. The defendants argued that a prosthesis is a specialized medical product, requiring a physician's skill and judgment in the determination of its use. The defendants therefore asserted that the physician, rather than the user, would be required to determine whether the product exposed the user to an unreasonable risk of harm. The court found that because the defective con-

ing the duty of a manufacturer to warn of dangers inherent in prescription drugs which are clearly obvious to the ordinary physician.

E. Proximate Cause

Products liability cases do not differ from ordinary negligence cases in the requirement that cause and fact must be established.⁶¹ It is necessary to prove not merely that the product caused harm, but also that the defect was the causative agent. This is normally established by applying the *sine qua non* or but-for test to the injury-causing event. However, either the most probable cause of the accident, or a proximate cause occurring concurrently and in combination with other causes, is held to be sufficient.⁶²

In *Dias v. Daisy-Heddon*,⁶³ the plaintiffs appealed from a judgment rendered in favor of the defendant Daisy-Heddon on the basis of a complaint which had charged the defendant with placing a defective and unreasonably dangerous air rifle in the stream of commerce. The plaintiffs contended that the instructions accompanying the rifle had failed to "adequately warn of the dangers associated therewith"⁶⁴ and that the design of that particular model was unreasonably dangerous. The court of appeals found, as a matter of law, that it could not conclude that the defendant's design or instructions for the particular rifle were the proximate cause of the plaintiff's injury.⁶⁵

Under the theory of strict liability, the plaintiff must demonstrate that the defective condition of the defendant's product was the proximate cause of the plaintiff's harm.⁶⁶ The court recognized the presumption under Indiana law, however, that when a warning is given, "the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in [a] defective condition, nor is it unreasonably dangerous."⁶⁷ The court found that a jury could have decided that if the warnings had been followed, the injury would not

dition in the prosthesis rendered it unreasonably dangerous to the plaintiff user and not to her physician, the question for the jury was whether the danger was one which was not contemplated by the user. *Id.* The trial court decided, therefore, that it was proper to key its instructions to the mind of the person who would be injured by the dangerous condition of the product. *Id.*

⁶¹W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 103 (4th ed. 1971).

⁶²388 N.E.2d at 555.

⁶³390 N.E.2d 222 (Ind. Ct. App. 1979).

⁶⁴*Id.* at 224.

⁶⁵*Id.* at 225.

⁶⁶*Id.*

⁶⁷*Id.* (citing RESTATEMENT (SECOND) OF TORTS § 402A, comment j (1965)).

have occurred.⁶⁸ Thus, the alleged defective design of the gun would not be the proximate cause of the injury, and the plaintiff would be precluded from recovering under section 402A.⁶⁹

The court in *Ortho* proceeded one step further by noting that the negligence of the user-physician in failing to heed a warning will not relieve a manufacturer of liability when the defendant's failure to provide *adequate* warnings may have contributed to the harm.⁷⁰ In *Ortho*, the manufacturing company argued that there were several circumstances which would necessarily preclude a finding that the alleged inadequate warnings were the proximate cause of the plaintiff's injury. The defendant primarily contended that the physician would not have relied on Ortho's warnings even if they had properly accompanied the product. The defendant asserted, therefore, that the warnings, or lack thereof, could not have been the proximate cause of the plaintiff's ingestion and subsequent injury because the doctor's prescription was not influenced by the absence of any warnings. The defendant also contended that the physician's own negligence was the proximate cause of the harm. The court, however, found that there was sufficient evidence available for a reasonable person to determine that the defendant's warnings were unduly delayed or lacked a sense of urgency sufficient to attract the attention of the prescribing physician.⁷¹

A number of jurisdictions have considered the issue of proximate cause and the intervening negligence of the attending physician in cases involving inherently dangerous drugs. The majority of cases have held that the intervening negligence of a physician is not a proximate cause defense when the inadequacy of the manufacturer's warnings may have contributed to the injury.⁷²

In *Stevens v. Parke, Davis & Co.*,⁷³ the court found that the defendant's over-promotion of its product was an inducement to the physician to disregard the warnings and that the disregard was therefore not an intervening cause of the decedent's injury.⁷⁴ Also, in *Sterling Drug, Inc. v. Yarrow*,⁷⁵ the court found that the failure of a physician to gather information from other sources about the dangerous propensities of the defendant's drug did not relieve the manufacturer of liability.⁷⁶ Similarly, the manufacturer in *Sterling*

⁶⁸390 N.E.2d at 225.

⁶⁹*Id.* at 225-26.

⁷⁰388 N.E.2d at 556.

⁷¹*Id.* at 557.

⁷²*Id.* at 556.

⁷³9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973).

⁷⁴*Id.* at 66-67, 507 P.2d at 663-64, 107 Cal. Rptr. at 55-56.

⁷⁵408 F.2d 978 (8th Cir. 1969).

⁷⁶*Id.* at 994.

*Drug, Inc. v. Cornish*⁷⁷ alleged that the physician's failure to "keep up" with current medical literature and the manufacturer's own literature was an intervening proximate cause. The court summarily rejected this contention and said that the sole issue was whether the manufacturer had made reasonable efforts to warn of the dangers present.⁷⁸

The *Ortho* court found that the failure of the user to read and follow directions may have been a causative agent of the harm; but it could not find, as a matter of law, that the inadequacy of the warning was not a contributing factor to the plaintiff's negligence.⁷⁹ Reasonable foreseeability, therefore, is the ultimate test of proximate cause. Contribution to the harm from an intervening cause fails to alter the test.⁸⁰

⁷⁷370 F.2d 82 (8th Cir. 1966).

⁷⁸*Id.* at 85.

⁷⁹388 N.E.2d at 557-58.

⁸⁰*Dreibelbis v. Bennett*, 162 Ind. App. 414, 421, 319 N.E.2d 634, 638 (1974), *cited in* 388 N.E.2d at 555.

XIII. Professional Responsibility

A. Enforcement of the Code

1. *General Sanctions Imposed in Disciplinary Proceedings.*— In determining the appropriate discipline to be imposed for a breach of the Indiana Code of Professional Responsibility,¹ the Indiana Supreme Court has chosen to balance the interest of the violating attorney against the need of the public for protection.² Many factors are employed in determining the weight of these interests.³ The following cases reflect examples of prohibited conduct and the discipline likely to ensue.

Otis W. Crumpacker was charged with nineteen different counts of misconduct.⁴ For instance, the respondent had demonstrated a pattern of irrational outbursts in court as well as a tendency to publicly insult his opponents.⁵ Crumpacker had exclaimed to one opposing counsel, "You snake son-of-a-bitch, that leaves but one thing for me to do, to go down and load up both barrels of my gun, and I'll getcha."⁶ The respondent also had utilized former clients' confidential information to their detriment.⁷ Moreover, Crumpacker had sent copies of a brief he had written for a pending suit to members of the bar who were not related to the case, thereby publicly disseminating extrajudicial statements concerning evidence and witnesses.⁸ The court concluded that such publications amounted to an obstruction of justice and violated several Disciplinary Rules as well.⁹ Finally, the respondent had filed suits merely to harass others.¹⁰

Despite this impressively bad record, the respondent defended on several grounds. Crumpacker alleged that the counts against him were also the subject matter of pending civil and criminal litigation and that the lower courts therefore had exclusive jurisdiction. This argument was dismissed as unfounded because civil and criminal

¹1978 IND. CT. R. 335. The Code contains the conduct-regulative Disciplinary Rules [hereinafter referred to as DRs], which establish the minimum professional standards below which no attorney may fall.

²See *In re Vincent*, 374 N.E.2d 40 (Ind. 1978); *In re Tabak*, 266 Ind. 271, 362 N.E.2d 475 (1977); *In re Murray*, 266 Ind. 221, 362 N.E.2d 128 (1977), *cert. denied*, 434 U.S. 1029 (1978).

³*In re Crumpacker*, 383 N.E.2d 36, 52 (Ind. 1978).

⁴*Id.* at 37.

⁵*Id.* at 46-49.

⁶*Id.* at 40.

⁷*Id.* at 42.

⁸*Id.* at 43-44.

⁹*Id.* at 44. See DRs 1-102(A)(1), (5)-(6); DRs 7-107(G)(1)-(2), (4)-(5).

¹⁰383 N.E.2d at 50-51.

matters are not decided in an action to discipline a lawyer, even though the disciplinary action involves facts similar to those in other suits.¹¹

Crumpacker also claimed that a former Indiana Disciplinary Commission member had a personal interest in the disbarment and that the commission was acting as a part of a conspiracy to harm him. This contention was denied as incredible.¹²

Finally, Crumpacker contended that an investigation by the commission of charges filed but not listed in a formal grievance was inappropriate. The court responded that disciplinary grievances should not be strictly construed and that an investigation was appropriate in all areas indicative of the general tenor of the complaints.¹³

Thus, Crumpacker employed his fiduciary role as a lawyer as a facade for frivolous suits, false accusations, and other de facto vindictive instruments. The court recognized that the lawyer should represent his client with zeal,¹⁴ but also stipulated that when "a lawyer loses sight of his purpose and uses the legal system for personal vengeance, he fails in his obligation to his client, profession and self."¹⁵ Appropriately, Crumpacker was disbarred.¹⁶

*In re Cochran*¹⁷ involved three counts of misconduct. As the administrator of an estate, Cochran had been in possession of an insurance policy. While the beneficiary was unaware of the policy's existence, the respondent forged the beneficiary's signature to obtain the policy proceeds and intermingled the proceeds with personal funds. The monies were eventually depleted without being repaid to the beneficiary.¹⁸

Cochran forwarded several excuses. He claimed that the coadministrator had knowledge of the funds and had not informed the beneficiary. The court responded that misconduct by the client does not waive the attorney's ethical responsibility.¹⁹ Also, the respondent claimed that he had forged the signature in a zealous effort to protect his client from litigation. The court held, however, that good motives would not protect the respondent in his failure to establish a proper trust fund account.²⁰

¹¹*Id.* at 38.

¹²*Id.*

¹³*Id.*

¹⁴*Id.* at 52.

¹⁵*Id.*

¹⁶*Id.* at 53.

¹⁷383 N.E.2d 54 (Ind. 1978).

¹⁸*Id.* at 56.

¹⁹*Id.*

²⁰*Id.* The court found that Cochran's conduct violated DRs 1-102(A)(1), & (3)-(5), constituting illegal conduct involving moral turpitude and conduct prejudicial to the administration of justice. *Id.*

The second count against Cochran entailed knowingly making a false statement of the law and knowingly failing to disclose information that he was required to reveal. The respondent urged a client to forge a minor's signature on a notice of waiver of the appraisal required under the inheritance tax laws.²¹ The respondent caused the waiver to be filed without authorization of the minor's guardians. Cochran also served as notary to the signature. The respondent's defenses were that authorization of signatures outside the presence of the notary was customary and that any financial or personal gain was not to inure to his benefit. The court concluded that these were not valid excuses and found the conduct was not within the bounds of the Code.²²

Finally, the third count accused Cochran, among other charges, of failing to reveal the receipt of cash and stock intended for the benefit of an estate. As a defense, Cochran claimed that the stock was worthless and that the funds were deposited in his account by error. The fact finder rejected these explanations as incredible and found that Cochran failed to preserve the identity of his client's property,²³ failed to act competently,²⁴ and failed to act in a manner which reflected positively on his fitness to practice law.²⁵

The mitigating factors of the respondent's good character, professional accomplishments, cooperation with the disciplinary commission, and repayment of converted funds were not sufficient to diminish the seriousness of the violations. He was therefore disbarred.²⁶

*In re Garrett*²⁷ involved two counts of misconduct. The court initially found that Garrett had failed to close an estate for a client although the respondent had received full payment for his services.²⁸ He also had failed to inform the client-beneficiaries of a conveyance in real property pertinent to the estate. Hence, Garrett failed to carry out a professional contract,²⁹ engaged in conduct prejudicial to the administration of justice,³⁰ and neglected an entrusted legal matter.³¹ Three violations of the disciplinary rules were consequently found.³²

²¹See IND. CODE § 6-4.1-5-9 (1976).

²²383 N.E.2d at 56-57. The conduct violated DRs 7-102(A)(3) & (5), amounting to concealment or failure to disclose and making an intentional false statement. *Id.*

²³See DRs 9-102(B)(1)-(4).

²⁴See DR 6-101(A)(3).

²⁵383 N.E.2d at 58. See DRs 1-102(A)(3)-(6).

²⁶383 N.E.2d at 59.

²⁷377 N.E.2d 1368 (Ind. 1978).

²⁸*Id.* at 1369.

²⁹See DRs 7-101(A)(2)-(3).

³⁰See DR 1-102(A)(5).

³¹See DR 6-101(A)(3).

³²377 N.E.2d at 1371.

The second count against the respondent emerged when a widow paid a \$500 retainer for the collection of insurance proceeds. Garrett represented to his client that he had filed suit against one of the insurers even though the insurer had never been contacted. The court concluded that Garrett had failed to act competently,³³ intentionally failed to represent his client zealously,³⁴ failed to carry out a professional contract,³⁵ and intentionally damaged his client during the course of his representation.³⁶ For these violations, Garrett was suspended one year.³⁷

In *In re Gilbert*,³⁸ after Gilbert's friend had died, the mortuary found the respondent's card in the decedent's personal effects. Gilbert gave the family's location to the mortuary and, in turn, the mortuary forwarded the key to the decedent's safe deposit box to Gilbert. The respondent opened the box and removed the contents in the presence of the assessor. Also, the respondent was given a check by the bank for the remaining balance in the decedent's two checking accounts. The family then demanded possession of this property. Although Gilbert informed the family that the items were in his possession, he refused to return them. Gilbert, therefore, assumed control over the decedent's estate assets without legal authority to do so. The court found Gilbert guilty of misconduct³⁹ and suspended Gilbert for sixty days.⁴⁰

2. *Illegal Conduct Involving Moral Turpitude.*—An attorney may be disbarred for a combination of small offenses which, in themselves, may not call for an extreme sanction. When an attorney is involved in illegal conduct, however, the violation obtains a new gravity. Usually, conviction of a felony is enough to warrant disbarment.⁴¹ Nevertheless, DR 1-102(A)(3) condemns an attorney for illegal activity only if such activity involves "moral turpitude."⁴² Hence, when examining an alleged violation of DR 1-102(A)(3), the ultimate issue is whether the illegal act displays a defect in character so grave as to signify the complete lack of moral fitness needed to practice law.⁴³

³³See DR 6-101(A)(3).

³⁴See DR 7-101(A)(1).

³⁵See DR 7-101(A)(2).

³⁶377 N.E.2d at 1371. See DR 7-101(A)(3).

³⁷377 N.E.2d at 1372.

³⁸375 N.E.2d 1111 (Ind. 1978).

³⁹*Id.* at 1112. Gilbert's conduct was dishonest and fraudulent and hence violated DR 1-102(A)(4).

⁴⁰*Id.*

⁴¹*Cf. In re Effron*, 58 A.D.2d 510, 397 N.Y.S.2d 100 (1977) (recognizing New York's automatic disbarment rule for felonies).

⁴²See DR 1-102(A)(3).

⁴³For discussion of another survey case involving moral turpitude, see notes 17-26 *supra* and accompanying text.

*In re Gorman*⁴⁴ dealt with this issue in a novel area. Gorman was convicted of conspiracy with the intent to distribute cocaine. The Disciplinary Commission brought a single count against the respondent. The commission's conclusion was that Gorman was involved in a crime of moral turpitude, thereby violating DR 1-102(A)(3). Gorman maintained, however, that the distribution of cocaine was only "malum prohibitum."

Throughout this proceeding, Respondent did not dispute the felony conviction or the facts giving rise to the conviction. He admits that he has committed an illegal act (malum prohibitum), but denies that he has done wrong (malum in se), arguing that the use of cocaine is neither addictive nor injurious to health. The Respondent thusly asserts that if he is to be disciplined it should be by reason of the illegality of the conduct and not by reason of a lack of moral fitness or turpitude.⁴⁵

The court turned to *Black's Law Dictionary*⁴⁶ to define moral turpitude as an act that reflects a "baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the *accepted and customary* rule of right and duty between man and man.'" ⁴⁷Hence, by definition social norms to a large extent define the boundaries of moral turpitude.

In applying this definition the *Gorman* court's reasoning reduces to two factors. First, Gorman disregarded the impact of his actions on the rest of society. Second, Gorman was involved in a criminal conspiracy, which displayed his anarchistic disregard for society's interest in law and order as well as disregard for the lawyer's vital role in the realization of that interest. "Respondent actively engaged himself in the introduction of a controlled substance into a market place that, unfortunately, is too often occupied by children and adolescents."⁴⁸ The court thus recognized that the use of a dangerous substance by young adults has great *social* repercussions that the respondent callously ignored. Moreover, Gorman attempted to "place himself above the law."⁴⁹ For all of these reasons, the court

⁴⁴379 N.E.2d 970 (Ind. 1978).

⁴⁵*Id.* at 971.

⁴⁶BLACK'S LAW DICTIONARY (4th ed. 1968).

⁴⁷379 N.E.2d at 971 (quoting BLACK'S LAW DICTIONARY 910 (4th ed. 1968) (emphasis added)).

⁴⁸379 N.E.2d at 971.

⁴⁹*Id.* at 972.

found that Gorman's actions demonstrated moral turpitude and that he was unfit to practice law.⁵⁰

It may be interesting to compare *Gorman* with *In re Higbie*.⁵¹ Among other issues, *Higbie* confronted the question whether the mere possession of marijuana was moral turpitude per se. *Higbie*,⁵² as well as *Gorman*,⁵³ recognized that certain illegal acts automatically indicate amorality. One of the most outstanding sins cited in *Higbie* was fraud.⁵⁴ *Higbie* concluded, however, that it could not be blindly asserted that the use of marijuana or its possession was, in itself, a per se violation of the Code:

[M]easured by the morals of the day . . . its possession or use does not constitute "an act of baseness, vileness, or depravity . . . contrary to the accepted and customary rule of right and duty between man and man" . . . or indicate that an attorney is unable to meet the professional and fiduciary duties of his practice.⁵⁵

Perhaps *Higbie* reflects a trend toward a more lenient view of drug use by attorneys. Certainly, both the *Higbie* and *Gorman* courts primarily condemned the respective respondents' involvement in conspiracies, although the courts were motivated by different reasons. The *Gorman* court was concerned about the marketing of a dangerous substance and its impact on the young.⁵⁶ The *Higbie* court, however, emphasized the possible adverse effects of legal experts devoted to breaking the law:

Respondent purposefully disregarded legal standards of conduct in his advice to Bagley [his client], and invited his friend to place himself in jeopardy of the law and to engage in an unlawful conspiracy. Respondent failed to sever himself from

⁵⁰*Id.*

⁵¹6 Cal. 3d 562, 493 P.2d 97, 99 Cal. Rptr. 865 (1972). Richard Higbie became involved with a client for whom he had performed work *pro bono publico*. The client, Bagley, proposed a scheme to smuggle marijuana into the country, thereby evading the federal marijuana transfer tax. I.R.C. § 4741 (repealed 1971). The respondent pitied Bagley because of his extreme financial difficulties and contacted several pilots willing to help the client execute the plot. Apparently, Higbie was not motivated by personal gain, but served merely as Bagley's benefactor. 6 Cal. 3d at 565-66, 493 P.2d at 98, 99 Cal. Rptr. at 866. Unfortunately, Bagley convinced Higbie to keep advancing funds so that the respondent was involved in the conspiracy until the last act. The client and his accomplices were apprehended along with the respondent. Higbie pleaded guilty and was convicted of a felony. *Id.* at 566-67, 493 P.2d at 99, 99 Cal. Rptr. at 867.

⁵²6 Cal. 3d at 570, 493 P.2d at 102, 99 Cal. Rptr. at 870.

⁵³379 N.E.2d at 971.

⁵⁴6 Cal. 3d at 571, 493 P.2d at 103, 99 Cal. Rptr. at 871.

⁵⁵*Id.* at 572, 493 P.2d at 103, 99 Cal. Rptr. at 871.

⁵⁶379 N.E.2d at 971.

that scheme when, on reflection, both conscience and the law so demanded. Moreover, respondent disregarded the legitimate interest and concern of the public that attorneys not use their legal knowledge to counsel and assist clients to violate the law.⁵⁷

Thus, the *Higbie* court, unlike *Gorman*, condemned the respondent's marketing of marijuana for reasons other than its status as a stumbling block for youth.

The holdings in *Gorman* and *Higbie* may support an argument for elevating conspiracy crimes to the per se category. Any lawyer implicated in a mass criminal plot has apparently lost a vital respect for the law as the very fabric of our society.⁵⁸

3. *Use in a Disciplinary Proceeding of Trial Testimony Given Under a Grant of Immunity.*—*In re Mann*⁵⁹ dealt with an Indiana statute providing immunity for witnesses' testimony in lieu of their taking a fifth amendment privilege. The Indiana Supreme Court held that the statute granted protection against criminal proceedings only and did not apply to attorney discipline.⁶⁰ Mann, as a witness in a criminal trial, had confessed to bribing a client's arresting officer in an attempt to gain favorable testimony. The respondent's complicity in this bribe could only be shown through testimony protected by the immunity granted under Indiana Code section 35-6-3-1.⁶¹ The respondent challenged the use of the testimony in his

⁵⁷6 Cal. 3d at 573, 493 P.2d at 104, 99 Cal. Rptr. at 872.

⁵⁸These conclusions seem to support the New York rule of automatic disbarment for every felony conviction. 29 N.Y. [JUD.] LAW § 90.4 (McKinney 1968). Such convictions could be said to indicate a fatal disrespect for the law. See, e.g., *In re Talve*, 66 A.D. 489, 413 N.Y.S.2d 472 (1979) (automatic disbarment for the injection of a narcotic substance and subsequent conviction for that felony); *In re Effron*, 58 A.D.2d 510, 397 N.Y.S.2d 100 (1977). Cf. *Committee on Professional Ethics & Conduct v. Hanson*, 244 N.W.2d 822 (Iowa 1976) ("We do not think a lawyer who attempted to engage in illegal drug traffic and who converted partnership funds possesses the qualities of good character essential in a member of the Iowa Bar." *Id.* at 824). The automatic disbarment rule has undergone extreme criticism. See *Automatic disbarment talk of town in N.Y.*, 65 A.B.A.J. 899 (1979); *N.Y. legislature may soften disbarment rule*, 65 A.B.A.J. 690 (1979).

⁵⁹385 N.E.2d 1139 (Ind. 1979).

⁶⁰*Id.* at 1141.

⁶¹IND. CODE § 35-6-3-1 (1976) reads:

Any witness, in any criminal proceeding, before a court or grand jury, who refuses to answer any question and/or produce any evidence of any kind on the ground that he may be incriminated thereby, may be ordered by the court to answer any question and/or produce any evidence upon a written request by the prosecuting attorney: Provided, That the witness shall be provided with timely notice and a separate hearing on the merits of the order. Unless the court finds that the issuance of the order would be clearly con-

disbarment proceedings.⁶²

The immunity statute provided that the witness should not be "prosecuted or subjected to penalty or forfeiture for or on account of any answer given or evidence produced,"⁶³ and the respondent alleged that this language would include disciplinary proceedings within its purview. The court said, however, that Mann's argument failed "to recognize the distinction in the law between a criminal proceeding and a disciplinary action."⁶⁴ The court reasoned that the Indiana Supreme Court has exclusive jurisdiction in all matters relating to attorney discipline.⁶⁵ Therefore, if the Indiana General Assembly enacted a statute which intruded on this exclusive jurisdiction, that statute would be null and void.⁶⁶ In determining the effect of Indiana Code section 35-6-3-1, the court asserted

that the intent of the Legislature in enacting this statute was to provide for immunity in criminal matters; the Legislature's use of the term "penalty and forfeiture" was not intended to touch on matters of attorney discipline. To hold otherwise, would suggest an unconstitutional invasion into this Court's constitutional authority and would allow the unreasonable consequence of placing the power to grant immunity in a local prosecutor and court which might vitiate the constitutional mandate of this Court in disciplinary matters.⁶⁷

trary to public interest, the witness shall comply with the order of the court. If, but for this section the witness would have been privileged to withhold the answer given or the evidence produced, he shall not be prosecuted or subjected to penalty or forfeiture for or on account of any answer given or evidence produced: Provided, further, That such immunity shall not be allowed in the case of any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order of the court.

⁶²385 N.E.2d at 1141.

⁶³IND. CODE § 35-6-3-1 (1976).

⁶⁴385 N.E.2d at 1141.

⁶⁵*Id.* See IND. CONST. art. 7, § 4. See also *State v. Bartholomew County Court*, 383 N.E.2d 290 (Ind. 1978); *In re Public Laws Nos. 305 & 309*, 263 Ind. 506, 334 N.E.2d 659 (1975); *Indiana State Bar Ass'n v. Moritz*, 244 Ind. 156, 191 N.E.2d 21 (1963); *Blood v. Gibson Circuit Court*, 239 Ind. 394, 157 N.E.2d 475 (1959).

⁶⁶385 N.E.2d at 1141.

⁶⁷*Id.* The court pointed out that it was not alone in the above interpretation of immunity statutes. Other jurisdictions show substantial support for Mann's position. See Annot., 62 A.L.R.3d 1145 (1975). One exception to this rule exists where the legislature has the power to direct the discipline of attorneys and where the questioned statute provides for immunity in "any proceeding." *Id.* But see *Committee on Legal Ethics v. Graziani*, 200 S.E.2d 353 (W. Va. 1973), *cert. denied*, 416 U.S. 995 (1974).

With the court's right to use the testimony secured, Mann was found guilty of several serious Code violations and was consequently disbarred.⁶⁸

B. Reinstatement from Suspension and Disbarment

1. *The Indiana View.*—*In re Allen*⁶⁹ involved a reinstatement petition. Allen had originally been suspended for two years for failing to pay a client's inheritance tax and for subsequently converting the funds forwarded for the tax payment. Initially, the hearing officer had concluded that Allen's conduct during the suspension was "exemplary and above reproach."⁷⁰ The petitioner had not practiced law during the suspension period and had abided by the orders of the court. The hearing officer felt, however, that Allen had failed to meet the burden imposed by Admission and Discipline Rule 23(4)(a)⁷¹ by committing an act of perjury during the reinstatement hearing.⁷²

In that hearing, Allen maintained that she was innocent of all charges upon which her original suspension was based. In response

⁶⁸385 N.E.2d at 1143. Mann's conduct violated several DRs, including DR 9-101(C), improperly influencing a public official; and DRs 1-102(A)(1), (3)-(6), the general provisions prohibiting the subversion of justice.

⁶⁹379 N.E.2d 431 (Ind. 1978).

⁷⁰*Id.* at 433.

⁷¹IND. R. ADMISS. & DISCP. 23(4)(a) reads:

No person whose privilege to practice law has been suspended shall be eligible for reinstatement to practice law in this State unless he establishes by clear and convincing evidence before the disciplinary commission of this Court that:

- (1) He desires in good faith to obtain restoration of his privilege to practice law;
- (2) The term of suspension prescribed in the order of suspension has elapsed or five (5) years have elapsed since the suspension;
- (3) He has not practiced law in this State or attempted to do so since he was disciplined;
- (4) He has complied fully with the terms of the order for discipline;
- (5) His attitude towards the misconduct for which he was disciplined is one of genuine remorse;
- (6) His conduct since the discipline was imposed has been exemplary and above reproach;
- (7) He has a proper understanding of and attitude towards the standards that are imposed upon members of the bar and will conduct himself in conformity with such standards;
- (8) He can safely be recommended to the legal profession, the courts and the public as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and an officer of the Courts;
- (9) The disability has been removed, if the discipline was imposed by reason of physical or mental illness or infirmity, or for use of or addiction to intoxicants or drugs.

⁷²379 N.E.2d at 433.

to questions concerning these charges, Allen testified that she regretted the appearance of wrongdoing, but could not feel remorse over a wrong which she felt was never committed.⁷³

New evidence, not considered in the original hearing, was submitted tending to show Allen's guilt. The hearing officer concluded that the petitioner's testimony was contradictory and incredible and therefore amounted to perjury. The Indiana Supreme Court concurred with the findings of the hearing officer and found that Allen had committed an original breach of the Code, and was not worthy of reinstatement.⁷⁴

Allen disputed the court's findings by claiming that the matters surrounding the alleged perjury in the reinstatement hearing were *res judicata*.

It is the position of the petitioner that the consideration of her testimony and its credibility by the original hearing officer in 1973, is *res judicata* as to this hearing. Therefore, the argument goes, such question could not be considered in the present petition for reinstatement by the hearing officer, the Commission, or this Court. The minority position in the present Disciplinary Commission is to the same effect: that even assuming without necessarily agreeing that petitioner committed perjury in the original disciplinary proceeding, such matter was already considered by this court, in its original Order, and necessarily included in that decision.⁷⁵

The petitioner apparently made this *res judicata* argument in connection with her right to maintain a plea of innocence in the reinstatement hearing. Although *Allen* is far from clear on this point, it seems the petitioner argued that allowing the hearing officer to submit new evidence tending to show her guilt and permitting the disciplinary commission to reconsider, *in any way*, the credibility of her innocent plea seriously impaired her right to assert that plea. Obviously, any reinstatement applicant would be reluctant to maintain his innocence in the light of a formerly adverse decision—undoubtedly based on overwhelming evidence—even if such applicant fervently believed that he did no wrong. If the fact finder is allowed to indirectly reconsider such an innocent plea, an inference of guilt and perjury is certain to follow. It would be much easier to lie, to offer a less than heartfelt confession and increase one's chances of reinstatement by feigning remorse. On the other hand, *res judicata* could assure that the peti-

⁷³*Id.* at 434.

⁷⁴*Id.* at 436.

⁷⁵*Id.* at 434.

tioner would never be asked to choose between being rewarded for lying or being rebuked for telling the truth.

Allen unconvincingly answered this argument. Although the court may have agreed with the petitioner that the issue of perjury in the *original proceeding* was foreclosed, the court treated the possible perjury in the *reinstatement hearing* as a different issue. Hence, because the reinstatement perjury was not litigated in the original hearing, the question of such perjury had not been barred.⁷⁶

This fine distinction does not answer *Allen's* objection, however. The perjury in the reinstatement and original hearings centered on the same issue, namely, *Allen's* attempts to prove her innocence.

⁷⁶In response to *Allen's* allegations, the court stated:

Further, the wrong committed by the petitioner was not in her professing innocence of commission of the act for which she was disciplined and found to be guilty. . . . Rather, her wrong was that in attempting to prove [sic] her innocence she gave untrue testimony, under oath, before the very tribunal attempting to make the truth determination of her fitness to be reinstated.

Id. at 436 (citation omitted). This was an apparent attempt to distinguish *In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975). Alger Hiss was convicted of perjury while testifying before the Committee on Un-American Activities of the House of Representatives. Hiss maintained that he never relinquished classified documents of the United States government into unauthorized hands and that he never saw his alleged contact, Whittaker Chambers, until after Hiss had supposedly passed the documents. For this so-called perjury, he was disbarred and sought reinstatement. *Id.* at 448-49, 333 N.E.2d at 431-32.

One of the many issues with which the *Hiss* court dealt was whether statements of repentance and recognition of guilt were necessary for reinstatement. *Id.* at 450, 333 N.E.2d at 436-37. The court concluded that the "continued assertion of innocence in the face of prior conviction does not, as might be argued, constitute conclusive proof of lack of the necessary moral character to merit reinstatement." *Id.* at 457, 333 N.E.2d at 436. The court further stated:

[A] rule requiring admission of guilt and repentance creates a cruel quandary: [A petitioner] may stand mute and lose his opportunity; or he may cast aside his hard-retained scruples and, paradoxically, commit what he regards as perjury to prove his worthiness to practice law. . . . Honest men would suffer permanent disbarment under such a rule. Others, less sure of their moral positions, would be tempted to commit perjury by admitting to a nonexistent offense (or to an offense they believe is nonexistent) to secure reinstatement. So regarded, this rule, intended to maintain the integrity of the bar, would encourage corruption in these latter petitioners for reinstatement and, again paradoxically, might permit reinstatement of those least fit to serve.

Id. at 458-59, 333 N.E.2d at 437.

This rule is logical. To require the petitioner to confess his guilt places the bar and the public in general in a no-win situation. The unscrupulous attorney will, of course, confess his guilt and be readmitted while the principled victim will maintain his position and be denied satisfaction. Thus, *Allen's* result—with its practical effect of requiring the petitioner to admit his guilt or face the penalty of impeachment and perjury—must be questioned. Our legal system has never claimed infallibility.

Such a distinction did not relieve her from the horns of the court's dilemma. She was still faced with an indirect reconsideration of her credibility through allegations of perjury. She still took a tremendous risk by asserting what she may have perceived to be the truth.

Justice Prentice dissented by implying that the majority had made a distinction without substance. "It appears to me that under the majority opinion one suspended for misconduct, despite his denial of the charges, may never be reinstated without first admitting to the original guilt."⁷⁷ Justice Prentice thus referred to the logical tension between two seemingly conflicting rules. On one side, the court suggested that the petitioner need not admit guilt to obtain a successful reinstatement. On the other, the court imposed a duty upon the petitioner to be truthful in all matters. Therefore, although the petitioner may plead innocent, if he cannot prove his innocence by showing that the decision of the prior proceeding was in error, an inference can be drawn that the petitioner is not being truthful.

2. *A Comparative View of Other Jurisdictions.*—There are four prevailing positions on innocent pleas in reinstatement proceedings. The Oregon Supreme Court in *In re Black*⁷⁸ has obtained a result similar to *Allen* through a more direct reasoning process.

The applicant testified at his original disbarment proceeding that he had not employed persons to solicit cases, and in the present proceeding he continues to so maintain. It follows either that applicant was erroneously found guilty or he is presently lying and, therefore, not entitled to reinstatement. Applicant has the burden of proving that he was erroneously convicted.⁷⁹

Hence, Oregon requires those reinstatement petitioners maintaining innocence to prove that the decision in the prior proceeding was wrong.

Another approach is found in *Maggart v. State Bar*.⁸⁰ The petitioner for reinstatement offered into evidence a cash receipt showing that he had reimbursed his client for the funds that he had supposedly embezzled, thereby claiming to have exonerated himself of

⁷⁷379 N.E.2d at 436 (Prentice, J., dissenting).

⁷⁸251 Or. 177, 444 P.2d 929 (1968).

⁷⁹*Id.* at 178-79, 444 P.2d at 930. The presence of a note naming successful targets for solicitation from a solicitor allegedly employed by the applicant was consistent with only two explanations: guilt or frame-up. No credible evidence was presented for the latter explanation although the applicant Black had passed a lie detector test. The court therefore "reluctantly" rejected Black's explanation and denied reinstatement. *Id.* at 191, 444 P.2d at 936.

⁸⁰29 Cal. 2d 439, 175 P.2d 505 (1946).

any related disciplinary charges. The court refused to consider any evidence pertaining to the original disbarment hearing, however, because it felt that by reexamining the charge of embezzlement, it would disturb the findings of the original proceeding, which must be considered final.⁸¹ Reinstatement, according to *Maggart*, was to be based solely on evidence of rehabilitation *subsequent* to the disbarment proceedings.⁸²

The California court could have allowed the petitioner to submit the new evidence and then proceeded to impeach him by demonstrating that the receipt was an attempted fraud on the *present* reinstatement examiners, as the *Allen* court did.⁸³ *Maggart*, however, did not employ this circular reasoning.

The above cases, *Allen*, *Maggart* and *Black*, represent three divergent opinions on a plea of innocence in reinstatement hearings. There is an obvious fourth—to refuse consideration of the petition unless the petitioner admits his guilt. This position might be dubbed the "Star Chamber Approach"⁸⁴ and, indeed, the Indiana Supreme Court's own rule concerning reinstatement⁸⁵ would seem to demand a confession of guilt. In Indiana, the petition for reinstatement will

⁸¹*Id.* at 443, 175 P.2d at 507.

⁸²*Id.* The court asserted that "[t]he evidence presented in support of such an application must relate to the conduct subsequent to disbarment and where this court has reviewed the record and determined in favor of disbarment or suspension, the evidence taken in the disciplinary proceedings will not be reconsidered." *Id.*

The affirmative duty to show rehabilitation places upon the petitioner the burden of slaying a rather nondescript social dragon. Most attempts to "prove" a reformation of character will center on elements of questionable relevance, such as religious activism. *See, e.g., In re Black*, 251 Or. at 178-79, 444 P.2d at 930. The court in *In re Albert*, 403 Mich. 346, 269 N.W.2d 173 (1978), discussed this lack of objective criteria for establishing rehabilitation in reinstatement proceedings and said:

A suspended lawyer petitioning for reinstatement should not feel compelled to present an exhaustive account of his life and character in the hope that he will, at some point, stumble on the essence of the problem as perceived by the panel and convince it that he is basically a good person who should be permitted to practice law.

Id. at 357, 269 N.W.2d at 177. To remedy the indefinite criteria of reinstatement, particularly with respect to suspended attorneys, the court required the suspension orders to impose certain preconditions for reinstatement which would reflect positive steps in rectifying bad behavior. *Id.* at 361, 269 N.W.2d at 179. For example, a lawyer with an alcohol problem would be required to show he had successfully controlled the problem. *Id.* at 359, 269 N.W.2d at 178. In the absence of such criteria, the court felt that the rule requiring "clear and convincing evidence" of rehabilitation would be largely meaningless and subject to the whims of hearing examiners. *Id.* at 360-61, 269 N.W.2d at 179.

⁸³379 N.E.2d at 435.

⁸⁴Fortunately, most courts, including the *Allen* court's opinion on its face, do not support the Star Chamber Approach. *In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975), is largely responsible for the widespread rejection of this approach.

⁸⁵IND. R. ADMISS. & DISCP. 23(4)(a)(5).

not be granted unless the petitioner's "attitude towards the misconduct for which he was disciplined is one of genuine remorse."⁸⁶ It is difficult to understand how the petitioner is to express remorse for an action which he believes he never committed. Clearly, if the supreme court did not intend to require a petitioner to confess guilt, the remorse requirement should be changed.⁸⁷

At least one court has analyzed this problem well. The Michigan Supreme Court, in *In re Albert*,⁸⁸ recognized the precarious balance between the duty to be truthful in the reinstatement hearings and the right to seek reinstatement without admitting guilt:

At a reinstatement hearing the lawyer may be asked hypothetical questions based on the prior misconduct to determine whether he understands the professions's standards. Such questions should be carefully phrased to preserve the lawyer's right to seek reinstatement without acknowledgment that the conduct for which he was disciplined was misconduct.

The *Albert* court then rejected the remorse requirement, believing it to be inconsistent with the applicant's right to maintain innocence.⁹⁰

C. *Conflict of Interests: Representation of Codefendants*

*Ross v. State*⁹¹ represents an area where professional responsibility meets with criminal procedure in an especially interesting

⁸⁶*Id.*

⁸⁷Notwithstanding these inconsistent interests, the *Allen* court is not alone in its reasoning. *In re Braverman*, 549 F.2d 913 (4th Cir. 1976), involved Maurice Braverman's conviction for conspiracy to teach and advocate the violent overthrow of the government. See 18 U.S.C. § 2385 (1976). Braverman was fined \$1,000, imprisoned for three years, and disbarred. Eighteen years later he sought reinstatement. 549 F.2d at 914. The Fourth Circuit stated that

"although concerned with his failure to express penitence, as we have previously noted, the district court, perhaps persuaded by the viewpoint of the Maryland Court of Appeals, did not refuse readmission on that ground. As we read the majority opinion, Braverman was denied readmission solely because he made statements to the panel of the court "either recklessly or with intent to mislead the panel."

Id. at 920 (quoting *In re Braverman*, 399 F. Supp. 801, 807 (D. Md. 1975)).

The Fourth Circuit agreed with the district court to the extent that Braverman did not have to admit his guilt, although he had a duty to be truthful. 549 F.2d at 920. The Fourth Circuit disagreed, however, that the former Communist was playing "fast and loose" with the reinstatement panel. Braverman's reinstatement petition was therefore granted. *Id.* at 921.

⁸⁸403 Mich. 346, 269 N.W.2d 173 (1978).

⁸⁹*Id.* at 353 n.6, 269 N.W.2d at 176 n.6.

⁹⁰*Id.* at 352, 269 N.W.2d at 175 (citing *In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975)).

⁹¹377 N.E.2d 634 (Ind. 1978). For another discussion of *Ross*, see Raphael,

way. Six defendants had been convicted of beating and robbing a priest. Defendant Ross, here the appellant, was the only one of the six to actually stand trial because the others had pleaded guilty. Ross contended that she had been denied effective representation of counsel because her attorney also represented a codefendant.⁹²

In addition, the law partner of Ross' attorney represented two other codefendants, both of whom testified against Ross at her trial. The appellant claimed that her attorney was reluctant to zealously cross-examine the other codefendant that he also represented for fear of jeopardizing that codefendant's plea bargain agreement.⁹³ Ross further asserted that her attorney was inhibited in his duty as an advocate by his partner's interest in preserving the credibility of the other codefendants, thereby protecting their plea agreements.⁹⁴

The court began its consideration with an ethical admonition:

Simultaneous representation of co-defendants is fraught with the potential for chaos at worst and frustration at best. It should be avoided as the plague. Code of Professional Responsibility, Canons 4, 5 and 9; Ethical Considerations 5-14, 15, 16, 17; 9-2. The road of litigation is full of blind curves, and this is especially true of criminal litigation. The lawyer who finds himself pledged to clients with conflicting interests has no completely safe haven. Even total severance leaves pitfalls, both for the clients and the lawyer. For the clients, it is likely that some unfavorable inference will arise; and for the lawyers, they should remember that the unsuccessful litigant seldom appreciates the subtleties of the rules or remember [*sic*] the caveats issued before the stewardship was undertaken.⁹⁵

The court reasoned, however, that dual representation did not present per se evidence of sixth amendment deprivation.⁹⁶ Instead, actual prejudice had to be shown absent an objection by the defendant's attorney at trial.⁹⁷

Hence, the appellant had three hurdles to overcome. First, she had to show a conflict of interest between herself and the other codefendants. Second, she had to demonstrate that her counsel's in-

Criminal Law and Procedure, 1979 Survey of Recent Developments in Indiana Law, 13 IND. L. REV. 187, 193 (1980).

⁹²377 N.E.2d at 636.

⁹³*Id.* at 637.

⁹⁴*Id.*

⁹⁵*Id.* at 636.

⁹⁶*Id.* The sixth amendment requires that an accused shall have "the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

⁹⁷377 N.E.2d at 637.

dependent professional judgment was more than likely affected by the conflict. Finally, she had to demonstrate that she was actually prejudiced by the impairment of her counsel's judgment.

The only conflict between Ross' testimony and the testimony of her codefendants was a discrepancy regarding which defendant struck the priest with a baseball bat. The issue therefore reduced to one of relative culpability. The court pointed out, however, that since the defendant had already admitted her guilt, the degree of culpability between the codefendants made no difference.⁹⁸ Indiana law views an accessory to be as guilty as the principal. The issue of who actually struck the priest was therefore moot. The court held that any existing conflict of interest was harmless beyond a reasonable doubt.⁹⁹

In the latest United States Supreme Court decision on dual representation, the Court held that dual representation was not a per se deprivation of sixth amendment rights.¹⁰⁰ The Court, however, left open the question of what level of conflict must be shown before sixth amendment rights will be impaired.¹⁰¹ Some decisions have held that the mere possibility of conflict is enough to show such a deprivation.¹⁰² Other decisions have required potential or demonstrable prejudice.¹⁰³ The result in *Ross* seems to place the Indiana Supreme Court among those courts that require demonstrable prejudice.

The United States Supreme Court has also left open the question of the affirmative duty of the trial judge to assure protection of constitutional rights by intervening.¹⁰⁴ The majority in *Ross* found that the trial judge had no affirmative duty to inquire into possible conflicts absent an objection by the defendant's attorney.¹⁰⁵

Justice DeBruler dissented on this point and said that whenever one jointly represented codefendant testifies to the detriment of the other, the conflict of interest is clearly established.¹⁰⁶ Thus, the dis-

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰*Holloway v. Arkansas*, 435 U.S. 475, 481 (1978).

¹⁰¹*Id.* at 483.

¹⁰²*Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Lawyer*, 62 MINN. L. REV. 119, 123 (1978).

¹⁰³*Id.*

¹⁰⁴*See* 435 U.S. at 483.

¹⁰⁵377 N.E.2d at 637. At least two other jurisdictions have embraced the *Ross* approach concerning the affirmative duty of the trial judge and the failure to find prejudice when relative culpability of codefendants was irrelevant. *See Trotter v. State*, 237 Ark. 820, 377 S.W.2d 14, *cert. denied*, 379 U.S. 890 (1964); *Roberts v. United States*, 348 F. Supp. 563 (E.D. Mo. 1972).

¹⁰⁶377 N.E.2d at 637 (DeBruler, J., dissenting).

sent maintained that the trial judge should have affirmatively intervened before commencement of cross-examination and ensured that no prejudice to the codefendant would result.¹⁰⁷ Justice DeBruler is not alone in his position. Many decisions in other jurisdictions approach any conflict of testimony with extreme caution as one of those situations fraught with prejudicial hazards.¹⁰⁸

Neither the dissenter nor the majority considered the possibility of employing the Disciplinary Rules as a check against dual representation and its adverse effects on the public. In a conflict of interest situation, two elements must always be satisfied to avoid a breach of the Code. First, it must be obvious that the lawyer can adequately represent the interests in question.¹⁰⁹ Second, full and fair disclosure of the possible conflicts and their full repercussions on the lawyer's judgment and potential prejudice to his client's rights must be rendered.¹¹⁰

It must be assumed that the *Ross* court felt that a violation in the case at bar was avoided by the satisfaction of these elements. A violation will not always be avoided by full and fair disclosure, however.¹¹¹ Some situations may be so permeated with conflicts as to exclude the possibility of fair representation in any circumstances.¹¹² The Indiana Supreme Court has recognized dual representation in a criminal situation as "fraught with the potential for chaos at worst and frustration at best. It should be avoided as the plague."¹¹³

This recognition, however, was only an admonition at the most. The supreme court suggests that dual representation is deadly, yet the court did not consider whether *Ross* was one of those situations in which, regardless of full and fair disclosure, dual representation was improper. Certainly, as the dissent argued, the *Ross* situation could be justifiably characterized as inherently prejudicial to a codefendant regardless of disclosure.¹¹⁴ One wonders why the dissent limited its argument to constitutional law.

¹⁰⁷*Id.* at 638. Justice DeBruler suggested that the trial judge should have first attempted to obtain a waiver of counsel from the appellant, and if that could not be accomplished, should have discontinued the attorney's representation of *Ross*. *Id.*

¹⁰⁸*See* Annot., 34 A.L.R.3d 470, 503 (1970), and cases cited therein.

¹⁰⁹*See generally* DRs 5-101 & 5-105.

¹¹⁰DR 5-105(A). *See In re Farr*, 264 Ind. 153, 165, 340 N.E.2d 777, 784 (1976).

¹¹¹*See In re A. & B.*, 44 N.J. 331, 209 A.2d 101 (1965); *Kelly v. Greason*, 23 N.Y.2d 368, 244 N.E.2d 456, 296 N.Y.S.2d 937 (1968); *Columbus Bar Ass'n v. Grelle*, 14 Ohio St. 2d 208, 237 N.E.2d 298 (1968).

¹¹²264 Ind. at 160, 340 N.E.2d at 782.

¹¹³377 N.E.2d at 636.

¹¹⁴Perhaps the *Ross* majority was recognizing Justice Frankfurter's view: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against the common attack." *Glasser v. United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting). However, less severe approaches are

Although dual representation presents an interesting criminal procedure problem, it may present a problem in professional responsibility of even greater magnitude. It has been proposed by some commentators that the present ABA Code of Professional Responsibility, which Indiana's Code closely follows, fails to the extent that the interests of the individual attorney are given an implicit priority over the interests of the client and the public in general.¹¹⁵ "Because lawyers have consistently been the ones judging 'practicality,' at points of conflict [their own interests] have repeatedly, albeit nonconsciously, prevailed."¹¹⁶

This misordering of priorities is also apparent in certain practices of lawyers. For example, the practice of allowing one attorney to represent more than one criminal defendant unequivocally benefits only the attorney by giving him a greater total fee than he would be able to charge a single client. By contrast, the benefit to the client is equivocal. On the one hand, the per capita cost of representation is likely to be lower and the efficacy of a stone wall defense enhanced. On the other hand, however, the client will often suffer significantly from the potential for divisions of his attorney's loyalties inherent in such situations. Finally, multiple representation represents an unmitigated disaster in terms of the fair and expeditious resolution of criminal matters.¹¹⁷

Hence, it has been proposed that the problem of dual representation may find a solution not in constitutional law, which employs a result-oriented analysis addressing the problem of actual prejudice when the real harm can only be conjecture in a "what if?" inquiry, but in professional responsibility, which confronts the issue at the time of the attorney's employment and prevents harm before it occurs.¹¹⁸

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available. For instance, in *United States v. Garafola*, 428 F. Supp. 620 (D.N.J. 1977), a supervisory rule was established prohibiting dual representation unless the attorney in question could state in good conscience that "there is absolutely no possibility, however remote, of a conflict arising in his joint representation of the defendants." *Id.* at 626. The Indiana Supreme Court has hinted at a similar precaution. In *Martin v. State*, 262 Ind. 232, 314 N.E.2d 60, *cert. denied*, 420 U.S. 911 (1975), the court felt that it was appropriate for the trial judge to initially appoint separate counsel for codefendants for an independent discovery of the facts. Only after such a discovery would the codefendants' defenses be consolidated. *Id.* at 240 n.3, 314 N.E.2d at 66 n.3.

¹¹⁵See Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

¹¹⁶*Id.* at 740.

¹¹⁷Geer, *supra* note 102, at 119-20 n.2.

¹¹⁸See *id.* at 148.

XIV. Property

Debra A. Falender*

During the survey period, Indiana appellate courts were confronted with a variety of interesting and sometimes factually complex disputes containing property law issues. In several cases, the central issue was the interpretation and construction of ambiguous or incomplete written instruments.¹ In the following discussion, the cases² are arranged to reflect whether the underlying transactions or events primarily involved: (1) landlord and tenant relationships, (2) land transfer agreements, (3) land ownership in general, (4) easements, (5) adverse possession, (6) zoning, or (7) ownership of personal property.³ Many of the cases are merely summarized without criticism or approbation because the decisions were not particularly earthshaking or particularly troublesome. In fact, as a whole, the decisions rendered in the property area during the survey period were thoughtful and well-reasoned.

A. Landlord-Tenant Relationships

Three noteworthy cases in the landlord-tenant area involved interpretation of ambiguous lease agreements. Litigation in each case might have been avoided by more precise drafting. In *Woodruff v. Wilson Oil Co.*,⁴ the lessors sued the lessee, alleging that a building

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¹One of these construction and interpretation cases presents a thorough analysis of the processes the trial court may utilize in construing an ambiguous writing. See *Indiana Broadcasting Corp. v. Star Stations*, 388 N.E.2d 568 (Ind. Ct. App. 1979), discussed in notes 67-73 *infra* and accompanying text. A careful reading of this case is encouraged.

²No significant statutory developments occurred during the survey period.

³Less significant cases will be mentioned in the footnotes within the related area. A few other cases, which do not fall within these listed topics, may be of interest: *Prell v. Trustees of Baird & Warner Mortgage & Realty Investors*, 386 N.E.2d 1221 (Ind. Ct. App. 1979) (vendor's lien compared to equitable mortgage; perfection, notice, and waiver of equitable mortgage); *City of Evansville v. Rieber*, 385 N.E.2d 217 (Ind. Ct. App. 1979) (proper measure of damages for injury to real estate); *State v. Cox*, 377 N.E.2d 1389 (Ind. Ct. App. 1978) (judgment docket as constructive notice).

⁴382 N.E.2d 1009 (Ind. Ct. App. 1978). Another recent decision involving interpretation of a lease is *Burgdorf v. Southern Ind. Gas & Elec. Co.*, 375 N.E.2d 670 (Ind. Ct. App. 1978) (lease provision allowing construction of "road" included power to construct "railroad"). Other recent cases in the landlord-tenant area are: *Malbin & Bullock, Inc. v. Hilton*, 387 N.E.2d 1332 (Ind. Ct. App. 1979) (reiterating well-settled Indiana and majority rule that, without an express agreement, a tenant cannot recover for improvements made to leased property); and *City of Michigan City v. Washington*

on the leased premises had been destroyed by fire as a result of the lessee's negligence.⁵ The court of appeals held that summary judgment for the lessee was properly granted.⁶ In one paragraph of the *Woodruff* lease agreement, the lessors agreed to pay " 'the costs of fire and extended coverage insurance on the premises during the term of [the] lease.' " ⁷ In another paragraph, the lessors agreed to repair at their expense any buildings and other improvements on the leased premises in the event of destruction " 'by fire or by the elements' " and " '[i]n this regard, . . . to keep in existence during the term of [the] lease such fire and extended coverage insurance in such amount as will insure the replacement of said buildings and improvements.' " ⁸

When a lessor is required to insure the leased premises for the benefit of both the lessor and the lessee, the lessor may not seek reimbursement for the insured loss from the lessee, even if the loss was caused by the lessee's negligence.⁹ In *Woodruff*, the court of appeals reasoned that the lease provisions must have been intended to require that the lessors provide insurance for the benefit of both parties because a lessor always has the right to insure the leased property for his own benefit.¹⁰ Thus, the lessors were entitled only to the insurance proceeds as reimbursement for the insured loss.

The *Woodruff* court's conclusion about the intended beneficiaries of the insurance is a reasonable one.¹¹ The effect of this

Park Amusement Corp., 384 N.E.2d 1063 (Ind. Ct. App. 1979) (Staton, J., dissented) (regarding municipal lease and subsequent void buy-sell agreement between municipal landlord and private tenant). *Washington Park* should be read by anyone involved in a landlord-tenant or vendor-purchaser relationship with a municipal corporation.

⁵The question of a lessor's liability in negligence for injuries suffered by a lessee arose in two recent cases. *Orth v. Smedley*, 378 N.E.2d 20 (Ind. Ct. App. 1978); *Meadowlark Farms, Inc. v. Warken*, 376 N.E.2d 122 (Ind. Ct. App. 1978).

⁶382 N.E.2d at 1010.

⁷*Id.*

⁸*Id.*

⁹See *id.* at 1010-11. If a lessor and lessee intend that the proceeds of an insurance policy are to protect both of them against a loss, then allowing one of them to place the ultimate burden of the loss on the other would defeat their contractual intention.

¹⁰*Id.* at 1011. The court applied the rule of construction that "no part of a contract should be treated as surplusage if it can be given a meaning reasonably consistent with the other parts of the contract." *Id.* The lessors argued that the lease provisions were not intended to obligate the lessor to obtain insurance for the benefit of the lessee but were included "to assure the availability of money with which the [required] restoration might be accomplished." *Id.* The court responded that if the parties intended to guarantee the availability of funds, then the separate agreement to pay the cost of insurance would be mere surplusage. *Id.* Thus, in affirming the summary judgment, the court of appeals relied on the existence of two separate obligations of lessors: one to pay the cost of insurance and the other to repair and insure.

¹¹Other courts might have easily resolved this interpretation question. For example, in *Liberty Mutual Fire Ins. Co. v. Auto Spring Supply Co.*, 59 Cal. App. 3d 860,

conclusion is to prevent the lessor's insurance carrier from shifting the risk of loss to the lessee.

In *Tarrant v. Self*,¹² the lessee Tarrant had an option to purchase the leased property for the fixed price of \$25,000 " 'after the first Fifteen (15) years of the term' " of the lease.¹³ Tarrant also had a " 'first option to purchase or lease the demised premises within thirty days after . . . notice on the same terms ' " as any bona fide offer received by the lessors at any time during the primary term or any renewal term of the lease.¹⁴ The primary term of the *Tarrant* lease was fifteen years, beginning August 1, 1959, and ending July 31, 1974. Tarrant had two five-year options to renew the lease.¹⁵

On June 10, 1974, which was fifty-one days prior to the expiration of the fifteen-year primary term of the lease, Tarrant notified the lessors of his intent to exercise the \$25,000 fixed-price option to

131 Cal. Rptr. 211 (1976), the court stated:

Whenever a building is leased or subleased for business purposes, it is customary to require in the various lease and sublease documents executed between the parties that some party to the lease or sublease provide protection from fire damage to the building and a source of funds for the alleviation of that damage by obtaining and maintaining adequate fire insurance on the building. Such a provision is for the implied benefit of all persons either owning or making primary use of the building. To construe otherwise, the scope of the protection so provided would be both unrealistic and unfair.

Id. at 865-66, 131 Cal. Rptr. at 214-15. The California court would regard a lessee in a case like *Woodruff* as "an implied in law co-insured of [the lessor], absent an express agreement between them to the contrary." *Id.* at 865, 131 Cal. Rptr. at 214. *See also*, e.g., *General Mills v. Goldman*, 184 F.2d 359 (8th Cir. 1950), *cert. denied*, 340 U.S. 947 (1951). *See generally* J. APPLEMAN, 6A INSURANCE LAW AND PRACTICE § 4055 (1972 & Supp. 1979).

¹²387 N.E.2d 1349 (Ind. Ct. App. 1979).

¹³*Id.* at 1351 (emphasis by the court). This will be referred to as the fixed price option. The case was complicated because two leases for adjoining properties were negotiated at the same time. The provisions of the leases were similar in many respects but not identical. Phillips Petroleum Company was the lessee under one lease (parcel one), and Tarrant was the lessee under the other (parcel two). Each lease was for a primary term of fifteen years, beginning August 1, 1959. Phillips had a fixed-price option to purchase parcel one for \$25,000 " 'at the end of the first Fifteen (15) years of the term' " of the lease. *Id.* at 1350. Tarrant's fixed-price option was an option to purchase both parcels for \$25,000 " 'if Phillips Petroleum Company . . . [did] not exercise its option to purchase [parcel one].' " *Id.* at 1351. If Phillips exercised its option to purchase parcel one, then Tarrant could purchase parcel two for one dollar. Phillips assigned its lease of parcel one to Tarrant on March 20, 1974. Although Tarrant apparently could have elected to purchase both parcels for \$25,000, Tarrant's notice to the lessor on June 10, 1974, prepared by Tarrant's attorney, indicated that Tarrant desired to exercise the option to purchase only parcel two for \$25,000. *See text* at note 16 *infra*. The court, therefore, interpreted the option provisions in the lease of parcel two and ignored the option provisions in the lease of parcel one.

¹⁴*Id.* at 1352.

¹⁵To exercise the option to renew, the lessee was required to give the lessor notice in writing at least 30 days before the expiration of the prior term. *Id.* at 1352.

purchase.¹⁶ Later, on July 29, 1974, and July 31, 1974, the lessors informed Tarrant of two bona fide offers to purchase the leased premises: one for \$40,000 and one for \$65,000. Tarrant did not indicate his intent to match the July offers within thirty days. Furthermore, Tarrant did not exercise his option to renew the lease. Nevertheless, Tarrant remained in possession of the leased premises, paying no rent after July 1974.

Tarrant sued the lessors for specific performance of what he believed to be an enforceable contract to purchase the property for \$25,000. The court of appeals affirmed the trial court's denial of specific performance.¹⁷ The trial court held that the lessee's fixed-price option to purchase did not exist under the terms of the lease until July 31, 1974, and therefore could not have been exercised unless the lessee first exercised his option to renew the lease for at least one five-year term.¹⁸ The court of appeals agreed that a literal reading of the lease provisions supported the trial court's holding. The court of appeals held for the first time:

Where . . . the lease does not prescribe which provision [the fixed-price or the right of first refusal] takes precedence over the other, if, before the lessee exercises . . . [the fixed-price option] *or before such option* comes into existence, whichever is later, the lessor properly notifies the lessee of a bona fide offer to purchase the leased premises, and the lessee refuses to exercise his option to purchase the property under the terms of such offer, then the lessee forfeits his right to purchase under the fixed-price option.¹⁹

¹⁶See note 13 *supra*.

¹⁷387 N.E.2d at 1352. The court of appeals also affirmed the trial court's order that the lessee pay back rent and relinquish possession of the leased property to the lessors. *Id.*

¹⁸*Id.* at 1353. The parties' intent is impossible to discern precisely. The court's interpretation was a reasonable one because the lessors may have wanted fifteen years (the entire primary lease term) to find a buyer at a price higher than \$25,000. One provision in the Phillips lease indicates an intent to preserve the fixed price option:

Failure of Lessee to elect to purchase or to lease under . . . [the paragraph describing the right of first refusal,] shall in no way limit or affect Lessee's rights under . . . [the paragraphs describing the fixed price option and the option to renew the lease,] and any sale or further leasing by Lessor, its successors or assigns to a third person shall in all respects be subject to this lease.

Id. at 1351. No similar provision was included in the Tarrant lease. The Tarrant lease merely provided that the " 'failure of Lessee to elect to lease under . . . [the paragraph describing the right of refusal] shall in no way limit or affect Lessee's rights under . . . [the paragraph describing the right of renewal].' " *Id.* at 1352. Even so, by the court's view, the fixed-price option did not exist under either lease unless and until the lease was renewed for one renewal term, and the exercise of the option on June 10 was not an exercise of an existing option.

¹⁹*Id.* at 1353. The court cited cases from other jurisdictions. None of the cited

In essence, the rights of the parties are established when either party properly exercises an existing option. In *Tarrant*, the lessee's option to purchase at the fixed price did not exist when the lessee attempted to exercise it. The lessors exercised their rights under an existing option before the lessee exercised his. Because Tarrant failed to indicate his intent to match the lessors' presumably bona fide offers²⁰ and also failed to renew his lease,²¹ Tarrant had no right to purchase or to continue to lease the property.

In *Madison Plaza, Inc. v. Shapiro Corp.*,²² the court of appeals held that the trial court did not abuse its discretion in denying an injunction that would have required the lessee to continue operating its store in the lessor's shopping center. Denial of specific relief, when a decree of performance would require court supervision for an extended time, is not in itself noteworthy.²³ *Madison Plaza* is interesting because of the appellate court's interpretation of a lease provision which required that the lessee " 'keep the premises open and available for business activity *except when prevented by strikes, fire, casualty or other causes beyond Tenant's reasonable control.*' " ²⁴ The trial court had decided that the lessee was not required to operate its store on the leased premises because " 'the store lost very substantial sums of money in its operation [despite the lessee's efforts] and thus its successful, i.e. profitable, operation was beyond the reasonable control of the [lessee].' " ²⁵ The court of appeals, however, sensibly held that the lessee's inability to operate profitably was not a cause beyond the lessee's control, excusing the

cases, however, dealt with the question of an attempted exercise of an option before that option had come into existence.

²⁰Because of the confusion as to whose rights were superior, it is insignificant that the lessor actually did not sell the property to one of the third party offerors. The lessee did not argue that the offers were not bona fide.

²¹If Tarrant had properly renewed his lease, Tarrant's premature exercise of the fixed-price option presumably would not have established his right to purchase. Tarrant would have been required to match one of the two bona fide third-party offers in order to purchase the property. Even if Tarrant had refused or failed to match one of the offers, he could have continued to lease the parcel(s) for the entire renewal term. Any sale to a third party would have been subject to Tarrant's rights under the lease. See note 18 *supra*.

²²387 N.E.2d 483 (Ind. Ct. App. 1979).

²³The decision to grant or deny specific performance is clearly within the sound discretion of the trial court. 387 N.E.2d at 486 (citing *Risk v. Thompson*, 237 Ind. 642, 147 N.E.2d 540 (1958); *Neel v. The Cass County Fair Ass'n*, 143 Ind. App. 339, 240 N.E.2d 546 (1968)).

²⁴387 N.E.2d at 485 (emphasis in original).

²⁵*Id.* The lessor expressly promised to " 'continuously use the demised premises for the purpose stated in this lease, carrying on therein Tenant's business undertaking diligently, assiduously and energetically.' " *Id.* The lessee also agreed not to vacate the leased premises without the written approval of the lessor. *Id.*

lessee's obligation to carry on its business on the demised premises.²⁶ The appellate court decided that the trial court erroneously placed the risk of the lessee's unprofitability on the lessor.²⁷

Residential landlords should review *Churchwell v. Collier & Stoner Building Co.*,²⁸ which is the first decision in Indiana to uphold a forfeiture upon a lessee's material breach of a lease provision prohibiting pets.²⁹ The lessee knew of the lease prohibition but did not attempt to secure a separate pet agreement covering its cat. Immediately upon discovering the cat, the landlord gave notice to vacate, and one day after the required vacation date the landlord commenced legal proceedings. The landlord's prompt insistence on its rights under the lease not only precluded a finding of waiver but also strengthened its argument that the breach was material.³⁰

B. Land Transfer Agreements

*Blake v. Hosford*³¹ concerned an alleged oral agreement between divorcing spouses for the disposition of a parcel of Indiana real estate.³² The real estate initially was owned by Janet Blake and Charles Hosford as tenants by the entireties. Prior to the dissolution of their marriage by an Arizona court, Janet allegedly agreed to release her interest in the farm to Charles in exchange for his promise to give the farm to their children on his death.³³ The only written confirmation of the oral agreement was a letter written by Janet to Charles' parents as follows: " 'I gave up any money or support for myself. He is only caring for the kids. I will take the furniture from here. The farm is to go to Roger, Clint, & Rena upon Bud's [Charles'] death.' " ³⁴

²⁶*Id.*

²⁷*Id.*

²⁸385 N.E.2d 492 (Ind. Ct. App. 1979).

²⁹*Id.* at 494-95. The court stated that no-pet provisions are reasonable and enforceable. The court quoted the RESTATEMENT OF CONTRACTS § 275 (1932), regarding the factors to be considered in determining materiality of a breach. The RESTATEMENT factors were adopted in *Ogle v. Wright*, 360 N.E.2d 240, 244 (Ind. Ct. App. 1977), discussed in 385 N.E.2d at 495.

³⁰Citing a similar case in which a landlord promptly asserted its rights, the *Churchwell* court specifically noted: "In *Riverbay Corp.*, the lessee was advised orally to dispose of the pet the day after moving in. Three days later he received a written demand and was the subject of legal action twenty-three days later." 385 N.E.2d at 494 (citing *Riverbay Corp. v. Klinghoffer*, 34 App. Div. 2d 630, 309 N.Y.S.2d 472 (1970)).

³¹387 N.E.2d 1335 (Ind. Ct. App. 1979).

³²Although the plaintiff wife claimed that the parties agreed to the disposition of certain personal property located in Indiana, the court of appeals did not find sufficient evidence of such an agreement. *Id.* at 1339.

³³*Id.* The court of appeals found sufficient evidence to support the trial court's conclusion that such an agreement had been reached. *Id.*

³⁴*Id.* at 1338.

Although the trial court found that Janet “voluntarily and intentionally relinquished any interest that she may have had in the real estate,”³⁵ the court of appeals disagreed, holding that the Statute of Frauds³⁶ rendered the alleged oral agreement unenforceable.³⁷ The court paraphrased *Restatement of Contracts* section 207³⁸ regarding the sufficiency of a memorandum to satisfy the Statute of Frauds:

In order that an agreement or contract to convey land may be enforced, it must be evidenced by some writing: (1) which has been signed by the party against whom the contract is to be enforced or his authorized agent, (2) which describes with reasonable certainty each party and the land, and (3) which states with reasonable certainty the terms and conditions of the promises and by whom and to whom promises were made.³⁹

Although Janet, the party to be charged, signed the letter and the letter described the real estate with sufficient certainty,⁴⁰ the memorandum did not establish the promise to be performed by Janet. The court explained: “In the instant case, the Husband alleged that the Wife promised to convey her interest in the farm to him. However, the letter did not contain any such promise. It merely stated that the farm will go to the children upon the Husband’s death.”⁴¹ The court would be stretching the sparse language of the letter beyond its reasonable limits to hold otherwise. The phrase stating that the “farm is to go to Roger, Clint, & Rena upon Bud’s death” does not indicate with reasonable certainty that Janet agreed to relinquish all legal interests in the real estate in exchange for her ex-husband’s promise to give it to their children. Janet might be expressing her intent as to the disposition of her interest in the farm on Charles’ death.

Because Janet did not relinquish her interest in the real estate, Janet and Charles held the entireties property in equal shares as tenants in common after the divorce.⁴²

³⁵*Id.*

³⁶IND. CODE § 32-2-1-1 (1976).

³⁷387 N.E.2d at 1341. The court also found no evidence of detrimental reliance by Charles sufficient to estop Janet from asserting the Statute of Frauds defense. *Id.* See *Lawshe v. Glen Park Lumber Co.*, 375 N.E.2d 275, 278 (Ind. Ct. App. 1978) (dicta regarding the doctrine of equitable estoppel).

³⁸RESTATEMENT OF CONTRACTS § 207 (1932).

³⁹387 N.E.2d at 1340.

⁴⁰“The farm” furnished a sufficient means of identifying the property and could properly be supplemented by parol evidence. *Id.*

⁴¹*Id.* at 1341.

⁴²IND. CODE § 31-1-12-17 (1971) (repealed 1973), provided in part:

Any property, real, personal or mixed, owned as joint tenants or as tenants

In *Frash v. Eisenhower*,⁴³ a judgment awarding a broker's commission was reversed by the court of appeals. The only written evidence of the landowner's agreement to pay a commission was a paragraph included in the broker's standard proposition form, which was signed by the landowner when he accepted the prospective purchaser's offer.⁴⁴ After the proposition was accepted, the purchaser told the broker that he could not secure financing. The broker returned the purchaser's earnest money and informed the landowner that the deal was cancelled.⁴⁵ Although the broker did not

by the entireties by the parties to the divorce action which shall not be expressly included in and covered by the decree of divorce shall, upon the rendition of such decree, vest in such parties equally as tenants in common.

In the present Dissolution of Marriage Act, IND. CODE §§ 31-1-11.5-1 to -24 (1976 & Supp. 1979), no similar provision exists. Indiana courts might take one of two approaches when entireties property is not expressly included in the divorce decree. Courts could construe IND. CODE § 31-1-11.5-1 (Supp. 1979) as giving a broad authority to divide the property "in a just and reasonable manner." *Id.* Thus, unequal division might be proper. The problem with this construction is that the statute specifically states that it is applicable only in actions "pursuant to section 3(a)," namely, actions for dissolution of marriage pursuant to *id.* § 31-1-11.5-3(a). Indiana courts are more likely to hold that, as a matter of common law, divorce severs a tenancy by the entireties and creates an *equal* tenancy in common shares. See *National City Bank v. Bledsoe*, 237 Ind. 130, 144 N.E.2d 710 (1957). The *Bledsoe* court stated: "[W]here the operation of a tenancy by entireties has been thwarted by a divorce or otherwise, the common law of the state divides the property equally between the original owners." *Id.* at 140, 144 N.E.2d at 715. Other courts have held that only a presumption of equal ownership exists:

This presumption may be rebutted by evidence showing the source of the actual cash outlay at the time of acquisition, the intent of the cotenant creating the joint tenancy to make a gift of the half-interest to the other cotenant, unequal contribution by way of money or services, unequal expenditures in improving the property or freeing it from encumbrances and clouds, or other evidence raising inferences contrary to the idea of equal interest in the joint estate.

Jezo v. Jezo, 23 Wis.2d 399, 406, 127 N.W.2d 246, 250 (1964).

⁴³376 N.E.2d 1201 (Ind. Ct. App. 1978).

⁴⁴The paragraph provided in part: "'As the owner of the property described herein I hereby accept *this proposition* . . . and I agree to pay to . . . Broker the sum of Five thousand dollars (\$5,000.00) Dollars commission *for services rendered in this transaction.*'" *Id.* at 1203 (emphasis added).

⁴⁵The broker returned the earnest money without advising the landowner and apparently without investigating what efforts were made or might have been made to secure the financing. Presumably, the proposition form used in this transaction contained the typical clause making the purchaser's obligation to purchase conditional on his obtaining financing. Such a clause imposes an implied obligation on the purchaser to make a good faith effort to obtain financing. *Billman v. Hensel*, 391 N.E.2d 671, 673 (Ind. Ct. App. 1979). If the purchaser fails to make a good faith effort, he cannot rely on the financing condition to excuse his obligation to perform. Thus, the landowner may have had a right to retain the earnest money as damages and, if so, the broker acted improperly in returning the money to the purchaser.

have further communication with the prospective purchaser, the broker sued the landowner for the commission when he learned that the landowner had conveyed the property to that purchaser.⁴⁶ Construing the written commission agreement against the drafting broker, the court of appeals decided that the broker was entitled to the commission only if the property was sold to that purchaser under the terms described in the written proposition.⁴⁷ The broker failed to prove that the ultimate sale was on the terms specified in the offer.⁴⁸

The Indiana Supreme Court, in *Morris v. Weigle*,⁴⁹ discussed and refined the equitable principles established in *Skendzel v. Marshall*,⁵⁰ regarding whether forfeiture or foreclosure is the appropriate remedy against a defaulting vendee under a conditional land sale contract. The distressing aspect of *Morris* is that two dissenting justices recommended that *Skendzel* be overruled as an unwarranted judicial interference with private contractual arrangements.⁵¹

C. Land Ownership In General

In *Knightstown Lake Property Owners Association v. Big Blue River Conservancy District*,⁵² the court of appeals affirmed the trial

⁴⁶376 N.E.2d at 1203. The record contained no evidence of the exact time or terms of the transfer.

⁴⁷*Id.* at 1204. IND. CODE § 32-2-2-1 (1976) (the so-called broker's Statute of Frauds) renders oral contracts for the payment of the real estate commissions unenforceable. The court of appeals held that the written commission agreement was "neither a general contract to pay a commission on the sale of the land to any person . . . procured by [the broker] nor a contract to pay a commission upon the sale of the land to Jones [the purchaser procured by the broker] upon any other terms." 376 N.E.2d at 1204.

⁴⁸376 N.E.2d at 1204. A landowner cannot use the Statute of Frauds to perpetrate a fraud. *Hatfield v. Thurston*, 87 Ind. App. 541, 161 N.E. 568 (1928). In *Frash*, however, the broker failed to show that the landowner fraudulently prevented the broker's negotiation of a satisfactory and successful sale. In fact, the broker himself "abandoned Jones as a prospective purchaser." 376 N.E.2d at 1204.

⁴⁹383 N.E.2d 341 (Ind. 1978) (3-2 decision), discussed in Townsend, *Creditor's Rights and Secured Transactions*, 1979 *Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 369, 374 (1980).

⁵⁰261 Ind. 226, 301 N.E.2d 641 (1973).

⁵¹Justice Pivarnik wrote: "[A]ppeals courts should honor contracts as they were made by the parties and enforce them regardless of where the chips may appear to fall from this perspective." 383 N.E.2d at 346 (Pivarnik, J., dissenting; Givan, C.J., concurring in dissent).

⁵²383 N.E.2d 361 (Ind. Ct. App. 1978). For another discussion of this case, see Galanti, *Corporations 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 133, 155-57 (1980). In another recent case involving land ownership, *Bruch v. Center-view Community Church, Inc.*, 379 N.E.2d 508 (Ind. Ct. App. 1978), the court of appeals approved the trial court's jury instruction describing the fee simple determinable created by arguably ambiguous language in a deed. The grantor conveyed to the grantee

court's finding that lot owners of the Knightstown subdivision were beneficial owners of certain condemned streets, lakes, parks, and other common areas and therefore were entitled to the proceeds of the condemnation award.⁵³ The Knightstown Lake Property Owners Association, a not-for-profit corporation, held title to the condemned property by a recorded deed dated May 23, 1932. Knightstown, however, ceased to function sometime thereafter. Pioneer Village Lot Owners Association, another not-for-profit corporation, attempted unsuccessfully to establish itself as Knightstown's successor.⁵⁴ In the absence of a successor to Knightstown, the trial court held, and the appellate court agreed, that the grantors intended the owners of subdivision lots to have beneficial ownership.⁵⁵

The trial court concluded that Pioneer's only claim was for reimbursement for real estate taxes it had paid on the property from 1965 until the time of trial.⁵⁶ The court of appeals, however, observed "without comment" that a "'payment of taxes by a stranger, a mere volunteer, cannot be made the foundation of any right or claim on the part of such person.'"⁵⁷ Because the parties failed to appeal the trial court's determination that Pioneer was entitled to reimbursement, Pioneer apparently can recover the taxes paid, although it arguably was a mere volunteer.⁵⁸

church "as long as used for church purposes, when not used for church purposes said property reverts back to [grantor]." *Id.* at 509. Applying the general rule that ambiguous language in a deed should be strictly construed against the drafting grantor, the court held that the jury instruction correctly stated that "no reversion would occur unless and until said real estate is no longer used for church purposes by [the original grantee] or another orthodox church." *Id.* at 510. Fee simples determinable are discussed generally in 4 G. THOMPSON, *THE MODERN LAW OF REAL PROPERTY* § 1871, at 528-45 (J. Grimes repl. 1979).

In the recent case of *Homemakers Fin. Serv., Inc. v. Ellsworth*, 380 N.E.2d 1285 (Ind. Ct. App. 1978), the court of appeals applied the accepted rule of deed construction that "a court will construe a recital as a covenant, rather than a condition, whenever such a construction is possible." *Id.* at 1287. *See generally* 4 G. THOMPSON, *supra* § 1874, at 557-64 (discussing the consequences of deciding that deed language creates a condition).

⁵³383 N.E.2d at 368.

⁵⁴Pioneer had the affirmative burden of proving its ownership interest. *Id.* at 366. Pioneer attempted to show that it was Knightstown's successor by reason of a de facto merger in 1965 and by reason of a statutory merger in 1976. *Id.* at 366-67. Because neither merger was properly established in the record as being in compliance with the Indiana Not-For-Profit Corporations Act, IND. CODE §§ 23-7-1.1-1 to -47 (1976 & Supp. 1979), Pioneer failed to meet its burden of proof. 383 N.E.2d at 367.

⁵⁵383 N.E.2d at 367.

⁵⁶Knightstown paid real estate taxes from 1932 until 1965; Pioneer paid taxes from 1965 until the time of trial.

⁵⁷383 N.E.2d at 367 (quoting 27 I.L.E. *Taxation* § 163 (1960)). *See* *Federal Land Bank of Louisville v. Dorman*, 112 Ind. App. 111, 41 N.E.2d 661 (1942).

⁵⁸The trial court's judgment stated: "Pioneer Village Lot Owners Association, Inc., has no standing in this action, and is not entitled to participate in the proceeds

D. Easements

1. *Express Easements*.—In *Jeffers v. Toschlog*,⁵⁹ the court of appeals discussed several basic principles involved in the creation, transfer, and termination of express easements. The court of appeals affirmed the trial court's judgment recognizing an easement across the Jeffers' property, the servient estate, for the benefit of the Toschlogs' property, the dominant estate. The easement was created by the following provision in a 1907 deed: " 'Said Jessee Horney [Jeffers' predecessor] hereby conveys to Wayne County Lumber Company [Toschlogs' predecessor] the right of ingress and egress for teams and wagons in conducting their business through an open driveway along the South line [of Horney's property] to South Main Street.' "⁶⁰ The Jeffers argued that the language created an easement in gross, which is a nontransferable right personal to the grantee lumber company. The trial court decided that the language created an easement appurtenant for ingress and egress to the dominant estate, and the court of appeals found sufficient evidence to support that conclusion.⁶¹ Because a conveyance of the dominant estate also conveys the easement, whether the easement is mentioned or not, Toschlogs had the right to use the easement.⁶²

The width of the easement was not mentioned in the conveyance creating it. The evidence revealed that a fence had been built on the

derived from this action, or to any share in the award of damages herein, except to reimbursement for taxes paid on the subject real estate." 383 N.E.2d at 365. The trial court found, however:

Pioneer Village Lot Owners Association, Inc. has paid taxes on the real estate involved in this action since sometime after its incorporation and through May 10, 1976, and is entitled to be reimbursed for the payment of such taxes as it has paid on the real estate subject to this action.

Id. The trial court's judgment is apparently final as to Pioneer's right to reimbursement.

⁵⁹383 N.E.2d 457 (Ind. Ct. App. 1978). Other easement cases decided during the survey period include: *Rees v. Panhandle E. Pipe Line Co.*, 377 N.E.2d 640 (Ind. Ct. App. 1978) (propriety of issuance of preliminary injunction preventing interference with easement holder's right to clear trees and brush from and to inspect its right of way easement); *Daviess-Martin County REMC v. Meadows*, 386 N.E.2d 1000 (Ind. Ct. App. 1979) (changing route of easement is a taking for public use) (servient owners must be compensated unless they agreed to change of route).

⁶⁰383 N.E.2d at 458. Similar language appeared in three subsequent deeds: one in 1930, in which Wayne quitclaimed the dominant estate to Green's Fork Lumber Company; another in 1946, in which Horney's successor quitclaimed the easement to Greens Fork; and one in 1943, in which Greens Fork conveyed the dominant estate to Cambridge Lumber Company.

⁶¹*Id.* at 459.

⁶²*Id.* The court of appeals also held that the evidence was sufficient to support the alternative finding that the Toschlogs and their predecessors had established an easement by prescription. *Id.* at 460.

Jeffers' property "six feet from the Jeffers' property line and had been there for *forty* years."⁶³ Without discussing the Jeffers' contention that they had acquired by adverse possession any part of the easement beyond the six foot width,⁶⁴ the court of appeals affirmed the trial court's decree that the Toschlogs "could move the fence . . . so that the easement would be eleven feet wide."⁶⁵ The court stated:

The easement was created for the purpose of permitting vehicles to pass through the driveway. No width of the easement was stated. The trial court had authority to construe the easement provision in a manner which would carry out the intentions of the parties. The trial court determined that the easement would have to be eleven feet wide in order to permit the passage of vehicles. The trial court did not err.⁶⁶

In *Indiana Broadcasting Corp. v. Star Stations*,⁶⁷ Indiana Broadcasting (IBC) granted Star Stations (Star) an easement for location of FM broadcasting equipment on a television tower owned by IBC.⁶⁸ When Star lost its FM broadcasting license, IBC asserted that Star's easement was terminated automatically by the operation of the following clause in the document granting the easement: " 'The easements and rights hereby granted shall continue so long as necessary to the respective radio transmission operations of the Grantee [Star] and the television broadcast transmission operations of the Grantor [IBC] ' "⁶⁹

Affirming the trial court's judgment that Star's easement was not terminated automatically when Star lost its broadcasting license, the court of appeals applied the rule that any "qualification

⁶³*Id.* at 460 (emphasis added).

⁶⁴If the fence ran parallel to the Jeffers' property line for the length of the easement, the Jeffers should have prevailed on a theory of adverse possession. See *Kline v. Kramer*, 386 N.E.2d 982 (Ind. Ct. App. 1979), discussed in notes 103-11 *infra* and accompanying text. Jeffers' failure to prevail may have resulted because the fence was perpendicular to the easement or because they failed to make or preserve their adverse possession arguments. The Jeffers argued that the entire easement had been abandoned by the dominant owners, but the court of appeals affirmed the trial court's determination, based on conflicting evidence, that the easement had not been abandoned. 383 N.E.2d at 459. Perhaps the Jeffers took an "all-or-nothing approach" at trial, hoping that the trial court would decide that the right to use any easement, six feet wide or wider, did not exist. Regardless, the appellate court's cursory discussion of the adverse possession theory is slightly troublesome. This reader would appreciate a statement that the trial court's decision, based on conflicting evidence, must be upheld.

⁶⁵383 N.E.2d at 460.

⁶⁶*Id.*

⁶⁷388 N.E.2d 568 (Ind. Ct. App. 1979).

⁶⁸*Id.* at 569. The grant of the easement occurred as part of IBC's sale to Star of certain assets connected with the operation of one AM and one FM radio station. *Id.*

⁶⁹*Id.* at 569-70. Other determining events were described in the document granting the easement, but the occurrence of the other events was not at issue on appeal.

in the nature of a limitation which would terminate an easement must be clearly established.”⁷⁰ The court of appeals noted that undefined and flexible words were used in the clause to describe the determining event:⁷¹ termination of the easement would occur when the easement was no longer “ ‘necessary to . . . [Star’s] radio transmission operations.’ ”⁷² Star’s loss of license was not clearly established as a determining event.⁷³

The most interesting aspect of *Indiana Broadcasting* is the court’s detailed analysis of the two processes that might have been used in construing the termination clause. The trial court could have resolved the construction issue as a question of law or as a mixed question of law and fact. The appellate court carefully explained how the clear establishment rule would have been applied under either process. The case, therefore, has value for anyone who has not recently pondered the processes of construction and interpretation of written instruments.

2. *Implied Easements.*—*State v. Innkeepers of New Castle, Inc.*,⁷⁴ was a condemnation action in which the State appropriated access rights and a portion of Innkeeper’s land abutting a state highway to convert the highway into a limited access thoroughfare. The action focused on the question of whether the State’s appropriation rendered the remainder of Innkeeper’s parcel “landlocked and inaccessible to the public.”⁷⁵ The State claimed that the parcel was not inaccessible because Innkeeper had an implied easement over the grantor’s land. Ordinarily, a way of necessity will be implied over the land of the grantor (or grantee) only if a large parcel of land is divided and part “conveyed in such a manner so as to leave the grantee [or grantor] completely landlocked.”⁷⁶

In 1966, Tabor, who represented a proposed Holiday Inn Motel, attempted to obtain a curb cut onto the state highway adjoining his parcel of land. The Indiana State Highway Commission refused

⁷⁰*Id.* at 573 (citing *GTA v. Shell Oil Co.*, 358 N.E.2d 750 (Ind. Ct. App. 1977), noted in Falender, *Property*, 1978 *Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 232, 245-46 (1979)).

⁷¹388 N.E.2d at 573.

⁷²*Id.* at 569. The court noted that the trial court could have broadly interpreted the quoted words by following the rule of construction that doubt or uncertainty of language will be resolved in favor of the grantee. *Id.* at 573. Under this rule, the court could have concluded that the easement continued to be “necessary” (meaning convenient or beneficial) to Star’s “radio transmission operations,” even if Star had no broadcasting license. *Id.*

⁷³*Id.* The parties admitted that they did not consider the matter when the language was chosen. *Id.* at 572 n.6.

⁷⁴392 N.E.2d 459 (Ind. 1979).

⁷⁵*State v. Innkeepers of New Castle, Inc.*, 375 N.E.2d 1129, 1131 (Ind. Ct. App. 1978), vacated, 392 N.E.2d 459 (Ind. 1979).

⁷⁶375 N.E.2d at 1131.

Tabor's curb cut application because of plans to make the highway a limited access highway. In April 1969, the State attempted to buy a portion of land abutting the highway as well as access rights from Tabor to accomplish its limited access plans. Tabor refused. In the following month, Tabor sold a part of the land abutting the highway to Innkeeper. Although Tabor retained land on each side of Innkeeper's property, which adjoined the state highway on one side and a county road on the other, the land sold to Innkeeper was accessible only by the state highway.⁷⁷

In December 1969, the State, which was unaware of the transfer from Tabor to Innkeeper, brought a condemnation action against Tabor to secure the parcel that the State previously had offered to purchase. After Innkeeper was joined as a party, the trial court tried the issue of damages sustained by Innkeeper from the condemnation of its property and excluded evidence offered by the State to show an implied way of necessity.⁷⁸ On an appeal brought by the State, the court of appeals held that the evidence concerning the implied easement was improperly excluded.⁷⁹

Disputing the court of appeals decision, Innkeeper argued that an implied easement could not be found at the proffered evidence because the transfer from Tabor to Innkeeper did not render Innkeeper's property inaccessible. Innkeeper had access to its property by the state highway at the time of the conveyance.

The Indiana Supreme Court agreed with Innkeeper by holding that the State could not lawfully deny curb cut applications because of future plans to construct a limited access highway.⁸⁰ Thus, Innkeeper held a right of access by way of the state highway at the

⁷⁷*Id.* at 1130.

⁷⁸*Id.* at 1131.

⁷⁹*Id.* The court of appeals explained:

Although it is true that the actual conveyance from the Tabors to Innkeepers did not landlock the Holiday Inn, the State's evidence tended to prove that (1) the Tabors had been the common owners of all the land; (2) Andrew Tabor was the major shareholder, a director and a chief executive officer of Innkeeper; (3) Tabor, both individually and as agent for Innkeeper, knew that all access rights to State Road 3 were to be appropriated by the State in the near future; and (4) the conveyance from the Tabors to Innkeeper occurred only a very short time prior to the commencement of the proceedings to condemn the access rights to State Road 3. Under the facts of this case, the above evidence would have been sufficient to have allowed the jury to find an implied easement of necessity over the Tabor's other properties. In addition to this, the appraisers for the State attempted to testify that an access road across the Tabor's land was already in use, which could have further strengthened the State's argument that an implied easement presently existed.

Id. at 1132.

⁸⁰392 N.E.2d at 464.

time of conveyance and at the time of the condemnation.⁸¹ The trial court, therefore, properly excluded the State's evidence.

3. *Easements by Private Eminent Domain.*—*Continental Enterprises, Inc. v. Cain*⁸² was an appeal taken from Continental's second attempt to obtain an easement over Cain's adjoining property. Continental owned a peninsula of land formed when the state dammed the Little Elkhart River in 1838. Continental attempted in the first action to establish its right to an easement by way of necessity over Cain's land, which constituted the "only unsubmerged land adjoining" Continental's peninsula.⁸³ Continental failed in the earlier action because the two parcels had never been under common ownership.⁸⁴ In the present action, Continental relied on Indiana Code section 32-5-3-1, which provides in part:

In all cases where, heretofore or hereafter, the lands belonging to a landowner or to landowners in this state, shall have been shut off from public highway . . . *by the erection of any dam constructed by the state of Indiana or the United States or any of their agencies or political subdivisions under the laws of the state of Indiana*, and in case the owner or owners of lands thus affected cannot secure an easement or right-of-way on and over the lands adjacent thereto, and intervening between such lands and the public highways most convenient thereto, either because the adjacent and intervening landowner or landowners refuse to grant such easement, or because the interested parties cannot agree upon the consideration to be paid by the landowner or landowners so deprived of such access to the highway, he or they shall have such right of easement established as a way of necessity under the provisions of [Indiana Code chapter] 32-11-1.⁸⁵

The trial court denied relief to Continental on constitutional grounds. The trial court found that Continental's efforts to secure an easement for private purposes did not violate the Indiana constitutional provision that "[n]o man's property shall be taken away

⁸¹See *id.* at 464-65; *Gradison v. State*, 260 Ind. 688, 300 N.E.2d 67 (1973).

⁸²387 N.E.2d 86 (Ind. Ct. App. 1979).

⁸³*Id.* at 88.

⁸⁴See *Continental Enterprises, Inc. v. Cain*, 156 Ind. App. 305, 296 N.E.2d 170 (1973), *noted in Polston, Property, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 228, 232-34 (1974).

⁸⁵IND. CODE § 32-5-3-1 (1976) (emphasis added). Apparently, the italicized language was inserted by an amendment to the statute, secured at Continental's urging after its first unsuccessful lawsuit.

by law, without just compensation.”⁸⁶ The court of appeals observed that “this language has been held to mean not only that compensation must be given for a condemnation for a public purpose, but also that private property may not be taken for a private purpose.”⁸⁷ Continental did not allege or prove that it sought to condemn an easement for a public purpose.⁸⁸ Making property “accessible for its fullest use” is not a public purpose.⁸⁹ Potential use as a “church site or something of that nature”⁹⁰ is not a public purpose.⁹¹ The possibility that the public might have access to Continental’s beaches does not establish a public purpose.⁹² The *Continental* court applied the traditional test for establishing public use: “[W]hether a public trust is imposed upon the property, whether the public had a legal right to the use, which cannot be gainsaid, or denied, or withdrawn at the pleasure of the owner.”⁹³ Continental’s obvious desire to acquire “easy access to its land” effectively negated any suggested public purpose.⁹⁴ Thus, Continental could not constitutionally use the statute to condemn an easement over Cain’s land.

Continental insisted that its plight resembled the situation of a property owner deprived of access because of the construction of a limited access highway.⁹⁵ If the state may take another’s land to provide access for the private benefit of the deprived landowner as an incident to the “larger state undertaking” of condemning a public highway,⁹⁶ the same theory should allow a landowner an easement as

⁸⁶IND. CONST. art. 1, § 21. The trial court also denied relief on the ground that the legislature intended the statutory relief to be “available only to those who held title to affected land at the time it was deprived of access by the state, and that to construe the statute to allow a taking by subsequent owner would sanction a taking for a private purpose in violation of the Indiana Constitution.” 387 N.E.2d at 89. The court of appeals agreed that the trial court “was correct in attempting to determine the legislature’s intent within the confines of the constitution.” *Id.*

⁸⁷387 N.E.2d at 90 (citing *Great W. Natural Gas & Oil Co. v. Hawkins*, 30 Ind. App. 577, 66 N.E. 765 (1903)). The *Continental* court also pointed out that IND. CODE § 32-5-3-1 (1976) refers to the general eminent domain act, *id.* § 32-11-1-1, which applies to anyone “having the right to exercise the power of eminent domain for any *public use*.” 387 N.E.2d at 90 n.2. *See also* *Foltz v. City of Indianapolis*, 234 Ind. 656, 130 N.E.2d 650 (1955).

⁸⁸Continental unsuccessfully attempted to amend its complaint after the trial court decision to allege a public purpose. The court of appeals held that the trial court’s rejection of the amendment was proper because the evidence did not demonstrate a public purpose. 387 N.E.2d at 90.

⁸⁹*Id.*

⁹⁰*Id.* (testimony of Continental’s president as to possible public purposes).

⁹¹*Id.* (citing *Fountain Park Co. v. Hensler*, 199 Ind. 95, 155 N.E. 465 (1927)).

⁹²387 N.E.2d at 90.

⁹³*Id.* at 91 (quoting 199 Ind. at 111, 155 N.E. at 470).

⁹⁴387 N.E.2d at 92.

⁹⁵*Id.*

⁹⁶*Id.* (citing *Andrews v. State*, 248 Ind. 525, 299 N.E.2d 806 (1967)).

an incident to the “larger public purpose” of constructing a dam.⁹⁷ The court of appeals agreed in principle but stated that the intervening 150 years since the construction of the dam eliminated any possibility that a condemnation might be considered an “incident to” the prior condemnation.⁹⁸ Furthermore, *Continental* was not the owner at the time of the 1838 taking.

Some jurisdictions have found a public purpose when land is made accessible for its fullest use, even though the sole beneficiary of a condemnation is the private owner who gains access to his land.⁹⁹ In some states, taking for private use is constitutionally permitted.¹⁰⁰ In other states, the “public use requirement, if not discarded, is at least overlooked”¹⁰¹ In Indiana, however, the public purpose requirement remains alive. Indiana requires that a specific dedication to an activity be “affected with a public interest”¹⁰² before a condemnation is constitutionally permitted. Although the *Continental* court did not strike down Indiana Code section 32-5-3-1 as unconstitutional, its decision cripples the statute’s effectiveness in providing remedies for landlocked owners.

E. Adverse Possession

*Kline v. Kramer*¹⁰³ involved a “classic boundary line dispute between neighbors,”¹⁰⁴ in which adjoining property owners each claimed title to a narrow strip of land along the southern border of the Kline property and the northern border of the Kramer property.¹⁰⁵ The Klines claimed title on the basis of their deed, whereas the Kramers based their ownership on the adverse possession of their predecessors in title. When the Kramers’ predecessor, Harry Britt, purchased the Britt-Kramer property in 1947, a fence existed along the northern boundary, enclosing the disputed strip as part of the Britt-Kramer parcel. The fence remained in the same location throughout Britt’s and the Kramers’ ownership.¹⁰⁶

⁹⁷387 N.E.2d at 92.

⁹⁸*Id.*

⁹⁹See *Latah County v. Peterson*, 3 Idaho 398, 29 P. 1089 (1892).

¹⁰⁰See *Tomten v. Thomas*, 125 Mont. 159, 232 P.2d 723 (1951), *overruled on other grounds*, *Callant v. Federal Land Bank of Spokane*, 593 P.2d 1036 (Mont. 1979).

¹⁰¹Note, *Eminent Domain in Tennessee: Public Use, Just Compensation and the Landowner*, 3 MEM. ST. U.L. REV. 65, 68 (1972). See e.g., *Draper v. Webb*, 57 Tenn. App. 394, 418 S.W.2d 775 (1967); *Swicegood v. Feezell*, 29 Tenn. App. 348, 196 S.W.2d 712 (1946).

¹⁰²*Foltz v. City of Indianapolis*, 234 Ind. 656, 664, 130 N.E.2d 650, 654 (1955).

¹⁰³386 N.E.2d 982 (Ind. Ct. App. 1979).

¹⁰⁴*Id.* at 985.

¹⁰⁵The strip was approximately 1 to 4 feet wide and 309 feet long. *Id.*

¹⁰⁶After Kramer purchased the property from Britt, Kramer accidentally knocked out a portion of the fence. Kramer repaired the fence, placing it in the prior location.

The trial court entered summary judgment quieting title to the strip in the Kramers. On appeal, Kline questioned whether the possession of the Kramers and their predecessors satisfied the elements of adverse possession. Adverse possession requires that possession be adverse, hostile, and under a claim of ownership.¹⁰⁷ Kline asserted that Britt's possession lacked the necessary adversity because Britt "testified that he never contemplated that he was claiming land that belonged to his neighbor."¹⁰⁸ Britt also testified, however, that "he felt that he owned the property up to the fence line and . . . used it to plant crops and pasture cattle."¹⁰⁹ Claimants commonly assert ownership of land in boundary line disputes and simultaneously admit that they did not intend to claim ownership beyond the true line.¹¹⁰ The Indiana court reiterated the majority view that the adversity required to establish title by adverse possession does not require an intent to claim land that belongs to another.¹¹¹ Adversity is established if the claimant asserts his right to possession without acknowledging that his possession is without right or is subservient to the actual owner.¹¹² Britt exhibited the req-

Based on this incident, the Klines asserted that the doctrine of equitable estoppel should bar the Kramers' equitable quiet title relief. The Klines claimed that after Kramer knocked down the fence, Kramer acknowledged surveyor stakes showing the true boundary. The Klines also asserted that Kramer remained silent as to his intent to claim title to the strip. Regardless, the Kramers had already obtained title by adverse possession for the required 10-year period. *See* IND. CODE § 34-1-2-2 (1976). Title would not have been divested even if Kramer had affirmatively indicated satisfaction with the position of the surveyor's stakes. *See* *Fatic v. Meyer*, 163 Ind. 401, 72 N.E. 142 (1904); *Grim v. Johns*, 61 Ind. App. 514, 112 N.E. 13 (1916).

¹⁰⁷Adverse and hostile are synonymous. 386 N.E.2d at 988. Claim of ownership (or claim of right) is discussed in *Kramer* and other cases which distinguish the claim of right element from the requirement that the possession be adverse. *See, e.g.,* *Rennert v. Shirk*, 163 Ind. 542, 546-48, 72 N.E. 546, 547-48 (1904); *Penn Cent. Transp. Co. v. Martin*, 353 N.E.2d 474, 477 (Ind. Ct. App. 1976); *Cooper v. Tarpley*, 112 Ind. App. 1, 7-8, 41 N.E.2d 640, 642-43 (1942). Nevertheless, adversity and claim of right seem to be synonymous. Both are inferred if the possessor acts as a true owner. *Id.* Both are negated if the possessor's acts, or other unequivocal expressions, indicate that his possession was permissive or trespassory. *E.g.,* 163 Ind. at 548, 72 N.E. at 548. In *Kramer*, the court stated that the claim of ownership requirement "is satisfied by entering upon and occupying the land with the intent to hold the land as one's own." 386 N.E.2d at 988. The same statement summarizes the essence of the adversity requirement. *See* notes 108-13 *infra* and accompanying text.

¹⁰⁸386 N.E.2d at 985.

¹⁰⁹*Id.*

¹¹⁰*Kotze v. Sullivan*, 210 Iowa 600, 602, 231 N.W. 339, 340 (1930). *See e.g.,* *Ridgely v. Lewis*, 204 Md. 563, 105 A.2d 212 (App. Div. 1954); *Van Allen v. Sweet*, 239 Mass. 571, 132 N.E. 348 (1921); *Burns v. Foster*, 348 Mich. 8, 81 N.W.2d 386 (1957); *Predham v. Holfester*, 32 N.J. Super. 419, 108 A.2d 458 (1954); *Beck v. Loveland*, 37 Wash. 2d 249, 222 P.2d 1066 (1950).

¹¹¹*See* 386 N.E.2d at 988.

¹¹²*Id.*; *Penn Cent. Transp. Co. v. Martin*, 353 N.E.2d 474 (Ind. Ct. App. 1976).

uisite adversity by acting as the sole owner of the disputed strip.¹¹³

The Klines also contended that the Kramers and their predecessors had not complied with the statute requiring payment of taxes by the adverse possessor.¹¹⁴ Following *Echterling v. Kalvaitis*,¹¹⁵ the court of appeals held that the “supplementary” tax payment statute is inapplicable in boundary disputes.¹¹⁶

A public highway may be established by continuous public use under a claim of right for a period of twenty years.¹¹⁷ In *Smolek v. Board of County Commissioners*,¹¹⁸ the court of appeals found sufficient evidence to support a conclusion that a highway was established by continuous adverse use.¹¹⁹ In 1926, the county commissioners attempted to establish the highway pursuant to a statutory grant of authority, but lacked jurisdiction because they had failed to notify the public of the proposed roadway. Although the public use was clearly shown to be adverse under a claim of right because of the commissioners’ action, ordinarily “continuous use for twenty years or more, unexplained, will be presumed to be under claim of right, and therefore adverse.”¹²⁰

¹¹³Britt’s mistaken belief that he was “merely acting in a manner consistent with [his] ownership rights . . . does not negate the conclusion that [his] possession was adverse.” 386 N.E.2d at 988.

¹¹⁴*Id.* at 986; see IND. CODE § 32-1-20-1 (1976).

¹¹⁵235 Ind. 141, 126 N.E.2d 573 (1955), cited in 386 N.E.2d at 989-90.

¹¹⁶386 N.E.2d at 990. Judge Hoffman dissented, stating that *Echterling* “should be overruled and the plain and unambiguous meaning of the statute returned to it as was contemplated by the Legislature which adopted it.” *Id.* (Hoffman, J., dissenting). The majority held:

[D]escriptions on tax statements may not be sufficient in all cases to serve as notice to the recorded titleholder that there is an adverse claimant who is claiming an interest adverse to his interest. Where the payment of taxes will not serve as notice to the recorded titleholder that someone is in possession of his land and claiming an interest adverse to his interest in the land, the statute requiring the payment of taxes is not a supplementary element of adverse possession. Boundary disputes as in *Echterling* . . . are typical circumstances where a tax statement does not serve notice of an adverse interest.

Id. at 989.

¹¹⁷IND. CODE § 8-20-1-15 (1976); *Cozy Home Realty Co. v. Ralston*, 214 Ind. 149, 14 N.E.2d 917 (1938). Public highways may also be created by an owner’s parol declaration or conduct indicating a dedication, if the statements or conduct are accompanied by public use. The recent case of *Cook v. Rosebank Dev. Corp.*, 376 N.E.2d 1196 (Ind. Ct. App. 1978), held that a road had been so dedicated.

¹¹⁸386 N.E.2d 997 (Ind. Ct. App. 1979).

¹¹⁹*Id.* at 998.

¹²⁰*Cozy Home Realty Co. v. Ralston*, 214 Ind. 149, 152, 14 N.E.2d 917, 918 (1938) (citing *Southern Ind. Ry. v. Norman*, 165 Ind. 126, 72 N.E.2d 896 (1905)). The quote from *Cozy* is further indication that adversity and claim of right are synonymous. See note 107 *supra*.

F. Zoning

Every year, trial courts need to be reminded of the applicable standard for reviewing a zoning board's decision granting or denying a use variance. This year was no exception. In *Speedway Board of Zoning Appeals v. Popcheff*,¹²¹ and *Metropolitan Board of Zoning Appeals v. Zaphiriou*,¹²² the trial courts reversed the boards' denial of use variances, and in each case the court of appeals reversed the trial court. To overturn a board's denial of a variance, the trial court must find that "each of the five statutory prerequisites has been established as a matter of law, giving wide construction to the total evidence and resolving all doubts in favor of the board's determination."¹²³ The *Popcheff* court noted:

This is obviously a formidable burden for a petitioner to carry. So long as the controlling legislation continues to require establishment of five very restrictive prerequisites before a Board can grant a variance, courts which review a negative determination by such Board are virtually powerless to overturn such determination. This significantly limited scope of review is exemplified by the plethora of appellate decisions which overturn reviewing court's reversals of Board denials. Indeed, only in the most rare case would a petitioner be able to establish each of the statutory elements *as a matter of law*.¹²⁴

Although a board's decision denying a variance will rarely be overturned when review is founded on statutory guidelines, the decision may be overturned when review is based on constitutional grounds.¹²⁵ In *Popcheff* and *Zaphiriou*, however, the constitutional arguments supporting the trial courts' decisions to overturn the variance denials were unsuccessful. The court of appeals in

¹²¹385 N.E.2d 1179 (Ind. Ct. App. 1979).

¹²²376 N.E.2d 110 (Ind. Ct. App. 1978).

¹²³*Id.* at 113 (quoting *Metropolitan Bd. of Zoning Appeals v. Standard Life Ins. Co.*, 145 Ind. App. 363, 366, 251 N.E.2d 60, 61 (1969)). The statutory guidelines referred to are found in IND. CODE § 18-7-2-71 (1976) (for granting variances in first class cities and counties). *Cf. id.* § 18-7-4-78 (four statutory prerequisites for other cities and counties). The standard of review of a board's decision to *grant* a variance is whether there is substantial evidence of probative value to support the board's decision. *See, e.g.*, 145 Ind. App. 363, 251 N.E.2d 60. *See generally* LeMond, *Where is Indiana Zoning Headed?*, 8 IND. L. REV. 976 (1974).

¹²⁴385 N.E.2d at 1181 n.2 (citation omitted).

¹²⁵*See, e.g.*, *Metropolitan Bd. of Zoning Appeals v. Sheehan Constr. Co.*, 160 Ind. App. 520, 313 N.E.2d 78 (1974). When a review is founded on constitutional guidelines, "the trial court may consider the evidence *de novo*, and the appellate court must consider all evidence in the light most favorable" to the decision of the trial court. LeMond, *supra* note 123, at 987-88.

Zaphiriou held that the denial of a variance for location of a retail “adult” bookstore was not a prior restraint on protected speech under the first amendment.¹²⁶ In *Popcheff*, the court of appeals held that the board’s decision was not arbitrary and capricious and that the petitioner received a “full and fair hearing free of improper considerations on his request for the variance.”¹²⁷

A constitutional argument in *English v. City of Carmel*¹²⁸ was raised prematurely in a direct action to the trial court after the landowners’ rezoning request was denied by the Carmel Town Trustees. The landowners asserted that the town trustees’ action was “arbitrary and capricious and constituted an unconstitutional taking of property.”¹²⁹ The owners’ complaint was dismissed properly by the trial court. Because the landowners claimed that the trustees’ refusal to rezone was unconstitutional as applied to them, the court stated that the landowners must first ask the board of zoning appeals for a variance to relieve the hardship and then, if relief is not granted, seek a review in the trial court by way of certiorari.¹³⁰

The zoning appeals board is required to make special findings of fact in support of its determination.¹³¹ The reviewing court must re-

¹²⁶376 N.E.2d at 113-14. Cf. *Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah’s Witnesses*, 233 Ind. 83, 117 N.E.2d 115 (1954) (free exercise of religion). The trial court in *Jehovah’s Witnesses* reversed the board’s denial of a use variance for location of a church in a residential neighborhood because the interest in land use control did not outweigh the opposing constitutional right of freedom of worship.

¹²⁷385 N.E.2d at 1182. A petitioner is entitled to a fair hearing. A decision by the board of zoning appeals is illegal if minimum requirements for due process are not met. See *Marion County Bd. of Zoning Appeals v. Sheffer & Clark, Inc.*, 139 Ind. App. 451, 220 N.E.2d 543 (1966). These minimum due process requirements are flexible, however, given the nature of a zoning board hearing. The *Popcheff* court stated:

[W]e are reluctant to interject the procedural and evidentiary formalities of trial into [a] hearing before Zoning Boards. Citizen remonstrators typically testify in these hearings without the assistance of counsel. For those citizens to lose their case on the basis of chance utterances would be to insert an unnecessary clog in the variance granting system.

385 N.E.2d at 1182.

¹²⁸381 N.E.2d 540 (Ind. Ct. App. 1978).

¹²⁹*Id.* at 541.

¹³⁰*Id.* at 542. *Accord, e.g.*, *Town of Homecroft v. Macbeth*, 238 Ind. 57, 148 N.E.2d 563 (1958); *City of East Chicago v. Sinclair Ref. Co.*, 232 Ind. 295, 111 N.E.2d 459 (1953); *City of South Bend v. Marckle*, 215 Ind. 74, 18 N.E.2d 764 (1939).

In the recent case of *Uhl v. Liters’ Quarry, Inc.*, 384 N.E.2d 1099 (Ind. Ct. App. 1979), a constitutional challenge by a county resident, alleging that a zoning ordinance established invalid classification schemes which denied equal protection of the law, was properly raised by direct action in the trial court. *Id.* at 1102-03. *Accord*, 215 Ind. at 82, 18 N.E.2d at 767 (due process claim).

¹³¹Prior to 1951, this was an express statutory requirement. As stated thereafter in *Carlton v. Board of Zoning Appeals*, 252 Ind. 56, 64, 245 N.E.2d 337, 343 (1969), the board is required to make findings of fact for reasons apart from the statute to insure “an adequate judicial review of the administrative decision.”

mand to the board if findings of fact are not made. In *Bridge v. Board of Zoning Appeals*,¹³² the petitioner applied for a special use permit, which the board granted. The board had granted a similar special use variance three years earlier; however, the trial court held on appeal that the evidence was insufficient to sustain the variance grant. The trial court's judgment was final, and no further appeal was taken. Ordinarily, the judgment would bar relitigation of the same issue. When the petitioner applied for the second special use variance, the remonstrators claimed that the doctrine of res judicata precluded the board from granting the variance.¹³³ The board made no findings of fact regarding the res judicata issue. The reviewing court improperly usurped the board's fact finding function by determining that a change of circumstances had removed the bar of the prior judgment.¹³⁴ Consequently, the court of appeals reversed the trial court and remanded the case to the board for consideration of the res judicata question.¹³⁵

G. Ownership of Personal Property

In *Moore v. Bowyer*,¹³⁶ the court of appeals reversed the trial court's judgment declaring that certain certificates of deposit held by Iva Kinnamon and her son Clarence Moore as joint tenants with right of survivorship were assets of Iva's estate even though Moore survived Iva.¹³⁷ All the funds in the accounts initially belonged to Iva. On the basis of *In re Estate of Fanning*,¹³⁸ the trial court concluded that the unambiguous terms of the signature card created "a rebuttable presumption that Iva intended the funds to be a gift to Moore."¹³⁹ The trial court, however, decided that Iva's failure to examine the card's terms rebutted the presumption of donative intent. The court of appeals disagreed, holding that Iva's failure to read the card would not by itself overcome the presumption.¹⁴⁰ Because Iva "had the opportunity and the capability to read the signature card," ordinary contract rules prevent relief from the terms of the

¹³²387 N.E.2d 99 (Ind. Ct. App. 1979).

¹³³*Id.* at 100.

¹³⁴*Id.* at 101.

¹³⁵*Id.*

¹³⁶388 N.E.2d 611 (Ind. Ct. App. 1979). Another recent case discussing personal property ownership was *Hayes v. Second Nat'l Bank*, 375 N.E.2d 647 (Ind. Ct. App. 1978) (despite preference for early vesting, trust provision a clear expression of settlor's intent to create alternative contingent remainders as to trust residue).

¹³⁷*Id.* at 612-13.

¹³⁸263 Ind. 414, 333 N.E.2d 80 (1975).

¹³⁹388 N.E.2d at 612.

¹⁴⁰*Id.* The *Fanning* court held that a certificate of deposit creating a joint account with rights of survivorship establishes a rebuttable presumption of donative intent. 263 Ind. at 421, 333 N.E.2d at 85.

signature card contract unless, fraud, misrepresentation, undue influence, duress, or breach of confidence existed.¹⁴¹ Although Moore apparently occupied a position of confidence as manager of Iva's financial affairs and as Iva's attorney-in-fact and although Moore obtained the signature cards from the financial institution, the "trial court did not attribute any misleading or offensive acts to Moore."¹⁴² Thus, the sole reason for rebutting the presumption of a gift was Iva's failure to read the card, and this "mistake of fact" alone would not invalidate the clear terms of the account contract.¹⁴³

The *Moore* court did not mention the Non-Probate Transfers Act,¹⁴⁴ probably because Iva died prior to the effective date of the statute.¹⁴⁵ Under the Act, the result would be the same: "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created."¹⁴⁶

In *Kratkoczki v. Regan*,¹⁴⁷ the court of appeals dismissed an appeal from a trial court judgment holding that the appellant and decedent held a certificate of deposit account as tenants in common.¹⁴⁸ Dissenting, Judge Garrard considered the merits of the

¹⁴¹388 N.E.2d at 612.

¹⁴²*Id.*

¹⁴³*Id.*

¹⁴⁴IND. CODE §§ 32-4-1.5-1 to -15 (1976 & Supp. 1979).

¹⁴⁵The *Moore* court did not disclose the dates of the deposits or the date of Iva's death. If the deposits were made before January 1, 1977 (the effective date of the statute), and Iva died after January 1, 1977, the statute should have been applied. The comments to the UNIFORM PROBATE CODE, from which IND. CODE § 32-4-1.5-4(a) (1976) was taken, indicate that the statute is intended to apply to accounts in existence when the statute is enacted. For example, the comment to UNIFORM PROBATE CODE § 6-104 states in part:

The section also is designed to apply to various forms of multiple-party accounts which may be in use at the effective date of the legislation. The risk that it may turn nonsurvivorship accounts into unwanted survivorship arrangements is meliorated by various considerations. First of all, there is doubt that many persons using any form of multiple name account would not want survivorship rights to attach. Secondly, the survivorship incidents described by this section may be shown to have been against the intention of the parties. Finally, it would be wholly consistent with the purpose of the legislation to provide for a delayed effective date so that financial institutions could get notices to customers advising them that review of their accounts may be desirable because of the legislation.

UNIFORM PROBATE CODE § 6-104, Comment.

¹⁴⁶IND. CODE § 32-4-1.5-4(a) (1976). Failure to read the signature card would probably not be "clear and convincing evidence of a different intention." *Id.* See also *Gaunt v. Peoples Trust Bank*, 379 N.E.2d 495 (Ind. Ct. App. 1978) (bank had no duty to explain the legal consequences of joint account).

¹⁴⁷381 N.E.2d 1077 (Ind. Ct. App. 1978).

¹⁴⁸*Id.* at 1079. The trial court dismissed the judgment, holding that the appellant and decedent held a certificate of deposit account as tenants in common.

case and stated that the signature card demonstrated the intent to create a joint tenancy with the right of survivorship and not a tenancy in common, although the actual certificate did not specify a right of survivorship.¹⁴⁹ Judge Garrard's conclusion would have been the same under the Non-Probate Transfers Act,¹⁵⁰ which presumes that an account in the names of two or more parties is owned with the right of survivorship regardless of whether "mention is made of any right of survivorship."¹⁵¹

A recent torts case provides an unusual conclusion for this survey of recent property developments. The court of appeals in *Noble v. Moistner*,¹⁵² which was an action in conversion to recover the value of property seized from the plaintiff's garage during a valid police search, cited the famous property case of *Armory v. Delamirie*.¹⁵³ *Armory* established the rule that "possession is title against all the world but the true owner."¹⁵⁴ Under the *Armory* rule, a defendant in a conversion action "cannot question the plaintiff's title or show title in a third party except to justify his seizure by authority of that title."¹⁵⁵ Thus, even a thief may be assured of peaceable possession against all but the true owner.

The court held that in Indiana the plaintiff in a conversion action has the burden of proving superior title.¹⁵⁶ Peaceful possession is "*prima facie* evidence of ownership which may be rebutted."¹⁵⁷ Therefore, defendants may show superior title in a third party as a defense to conversion actions. This Indiana rule may be historically justifiable,¹⁵⁸ but its ramifications are appalling. Persons who cannot ultimately show superior title to the property they possess are not

¹⁴⁹*Id.* at 1081 (Garrard, J., dissenting).

¹⁵⁰IND. CODE § 32-4-1.5-1(4) (1976). Even if the court had reached the merits, the court could not have applied the Non-Probate Transfers Act because the decedent died prior to the effective date of the Act. See note 145 *supra*.

¹⁵¹IND. CODE § 32-4-1.5-1(4) (1976).

¹⁵²388 N.E.2d 620 (Ind. Ct. App. 1979).

¹⁵³1 Strange 505 (1722) (action by a chimney sweep against a jeweler to recover the value of a jewel found by the sweep and given to the jeweler for appraisal), cited in 388 N.E.2d at 622.

¹⁵⁴388 N.E.2d at 622.

¹⁵⁵*Id.*

¹⁵⁶The *Noble* court stated: "The essential elements to be proved by the plaintiff are 'an immediate, unqualified right to possession resting on a superior claim of title.'" 388 N.E.2d at 620 (quoting *Yoder Feed Serv. v. Allied Pullets, Inc.*, 359 N.E.2d 602, 604 (Ind. Ct. App. 1977)). The *Noble* court also stated: "'In actions for conversion the plaintiff must recover on the strength of his own title and not upon the weakness of his adversary.'" 388 N.E.2d at 621 (quoting *Foudy v. Daugherty*, 118 Ind. App. 68, 76, 76 N.E.2d 268, 271-72 (1947)).

¹⁵⁷388 N.E.2d at 622.

¹⁵⁸See cases cited in 388 N.E.2d at 621-22.

guaranteed peaceable possession. Indeed, the Indiana rule encourages an endless succession of thefts once property comes into the possession of one who cannot prove his superior right to retain it.

XV. Secured Transactions and Creditors' Rights

R. Bruce Townsend*

The last year has produced at least forty decisions related to secured transactions and creditors' rights encompassing a wide spectrum of substantive and procedural problems. Some positive contributions were made to this area of the law. Most significant on the affirmative side are cases recognizing the contract to execute a mortgage as a valid security device,¹ preserving the integrity of *Skendzel v. Marshall*,² denying set off of an old debt by a bank against a deposit of proceeds from collateral covered by a perfected security agreement,³ placing voluntary liens held by the United States on a par with other lienholders in the priority scale by adopting state law as the federal rule,⁴ permitting an optional motion to correct errors from proceedings supplemental,⁵ facilitating enforcement of support orders by execution,⁶ granting a surviving tenant by the entirety exoneration and marshaling rights to satisfy a lien upon the property for a debt of the decedent,⁷ and protecting subcontractors on a surety bond when the owner-creditor defaults.⁸ On the negative side, judges deserve encouragement to do better as a result of decisions abusing consumer legislation,⁹ imposing vicarious liability on filing officers for negligence of subagents,¹⁰ permitting abusive and

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¹Prell v. Trustees of Baird & Warner Mortgage & Realty Investors, 386 N.E.2d 1221 (Ind. Ct. App. 1979). See notes 36-43 *infra* and accompanying text.

²261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974), *construed in* Morris v. Weigle, 383 N.E.2d 341 (Ind. 1978). See notes 45-49 *infra* and accompanying text.

³Citizens Nat'l Bank v. Mid-States Dev. Co., 380 N.E.2d 1243 (Ind. Ct. App. 1978). See notes 57-73 *infra* and accompanying text.

⁴United States v. Kimbell Foods, Inc., 99 S. Ct. 1448 (1979). See notes 112-16 *infra* and accompanying text.

⁵Hudson v. Tyson, 383 N.E.2d 66 (Ind. Ct. App. 1978). See notes 139-42 *infra* and accompanying text.

⁶Kuhn v. Kuhn, 389 N.E.2d 319 (Ind. Ct. App. 1979). See notes 153-54 *infra* and accompanying text.

⁷In re Estate of Smith, 388 N.E.2d 287 (Ind. Ct. App. 1979). See notes 172-78 *infra* and accompanying text.

⁸Culligan Corp. v. Transamerica Ins. Co., 580 F.2d 251 (7th Cir. 1978). See notes 186-90 *infra* and accompanying text.

⁹Streets v. M.G.I.C. Mortgage Corp., 378 N.E.2d 915 (Ind. Ct. App. 1978), to the extent the case placed the burden of proof upon the debtor with respect to attorney's fees, and the decision's cavalier treatment of disclosure requirements. See notes 18-31 *infra* and accompanying text.

¹⁰Mobile Enterprises, Inc. v. Conrad, 380 N.E.2d 100 (Ind. Ct. App. 1978)

highly offensive collection practices,¹¹ denying enforcement of a contractual promise by the owner to help a subcontractor recover payments due from the prime contractor,¹² and determining that a woman contracting for construction of a day care center in her home is not entitled to advance notice of a mechanic's lien by a subcontractor because the construction did not involve a "family dwelling."¹³ The Indiana legislature also has busied itself by legislating in this area of the law, but its attention has been mainly attracted by special interests representing lenders and creditors.¹⁴

A. Consumer Legislation

Most consumer protection afforded by the Indiana Uniform Consumer Credit Code is denied to credit purchasers of land and to mortgagors whose loan is "primarily secured by an interest in land."¹⁵ By definition the credit or loan qualifying for this exemption must not carry a finance charge in excess of ten percent.¹⁶ In 1979, the Indiana legislature raised this maximum to fifteen percent for loans¹⁷ in what must be classified as both an inflationary and anti-consumer move. *Streets v. M.G.I.C. Mortgage Co.*¹⁸ also dealt with this provision and found that it excluded first mortgagees on loans "primarily secured by an interest in land" from the licensing requirements of the Code since such loans are not consumer loans.¹⁹

(secretary of state); *VanNatta v. Crites*, 381 N.E.2d 532 (Ind. Ct. App. 1978) (Commissioner of Bureau of Motor Vehicles). See notes 74-83 *infra* and accompanying text.

¹¹*Kaletha v. Bortz Elevator Co.*, 383 N.E.2d 1071 (Ind. Ct. App. 1978). A companion type of case encouraging extrajudicial harassment by a form of retaliatory discharge deserves an all time "golden fleece" award: *Martin v. Platt*, 386 N.E.2d 1026 (Ind. Ct. App. 1979). These cases are briefly considered at notes 90-92 *infra* and accompanying text.

¹²*Hormuth Drywall & Painting Serv., Inc. v. Erectioneers, Inc.*, 381 N.E.2d 490 (Ind. Ct. App. 1978). See notes 97-101 *infra* and accompanying text.

¹³*Wiggin v. Gee Co.*, 386 N.E.2d 1218 (Ind. Ct. App. 1979). See notes 102-06 *infra* and accompanying text.

¹⁴For example, bankers and lenders received special treatment by a revision of the Uniform Consumer Credit Code [hereinafter referred to as the U.C.C.C. or Code] expanding exemptions from the law. See IND. CODE § 24-4.5-3-105 (Supp. 1979). See notes 15-17 *infra* and accompanying text. Bankers also received special treatment regarding garnisheed bank accounts. See IND. CODE § 28-1-20-1 (Supp. 1979). See notes 143-50 *infra* and accompanying text.

¹⁵IND. CODE §§ 24-4.5-3-105, -2-104(2)(b) (1976). Such sales and loans are subject to disclosure and remedies provisions. It is this writer's opinion that such loans qualify as "consumer related" loans and credit sales and are subject to regulation thereunder. See §§ 24-4.5-2-602, -3-602.

¹⁶*Id.* § 24-4.5-3-105 (1976) (amended 1979).

¹⁷*Id.* § 24-4.5-3-105 (Supp. 1979).

¹⁸378 N.E.2d 915 (Ind. Ct. App. 1978).

¹⁹*Id.* at 918.

The court in *Streets* applied the Code rule allowing a debtor to set off penalty claims arising from the lender's failure to make proper disclosures against an action upon the loan,²⁰ thus tolling the one-year limitation for enforcing such claims.²¹ Although not articulated by the decision, it seems that the court applied Indiana Code disclosure rules which adopt by reference the disclosure requirements of Regulation Z under the federal truth-in-lending law.²² Unless reduced to judgment, such a setoff is not permitted when the debtor asserts nondisclosure rights solely by force of the federal regulations and law.²³ The court also found that the disclosure requirement of the "annual percentage rate" was doubly conspicuous when set forth in bold, but smaller, type.²⁴ On the other hand, an acceleration clause for late payment of installments was not unconscionable and need not have been conspicuously disclosed.²⁵

The debtor in *Streets* complained that an allowance of attorney's fees to a second mortgagee violated a Uniform Consumer Code provision permitting recovery of reasonable attorney's fees with respect to a consumer loan only when the agreement provides for "payment . . . after default and referral to an attorney not a salaried employee of the lender."²⁶ The court correctly assumed that a loan by a second mortgagee was not exempt from provisions applicable to consumer loans.²⁷ Exempt loans are loans "primarily secured by an interest in land,"²⁸ which by definition require the value of the debtor's interest in the land at the time of the loan, less prior liens, to be "substantial in relation to the amount of the

²⁰IND. CODE § 24-4.5-5-205 (1976). See also *Holmes v. Rushville Prod. Credit Ass'n*, 355 N.E.2d 417, 417 (Ind. Ct. App. 1976).

²¹378 N.E.2d at 919. The court in *Streets* also applied IND. R. TR. P. 13(J), which provides for the effect of statute of limitations and other discharges at law. *Id.*

²²*Id.* at 920. Disclosure requirements of the U.C.C.C. and Regulation Z are not identical, but the Code provides that disclosure requirements meeting Z requirements meet Code requirements. *E.g.*, IND. CODE § 24-4.5-3-301(2) (1976). It appears that the court thus applied U.C.C.C. disclosure requirements as defined by reference to federal law.

²³Federal law prohibits interposition of disclosure penalties by way of setoff unless reduced to judgment. 15 U.S.C. § 1640(h) (1976).

²⁴378 N.E.2d at 920. Regulation Z requires "annual percentage rate" and "finance charge" to be printed more conspicuously than other disclosures which are required to be conspicuous. Fed. Reserve Bd. Reg. Z, 12 C.F.R. § 226.6(a) (1979). The court upheld the percent sign in ordinary print without such conspicuousness. *Id.* at 920.

²⁵*Id.* at 919. Substantial authority holds that the right to accelerate must be conspicuously disclosed. *Cf. St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977) (recognizing four divergent views taken by the courts).

²⁶IND. CODE § 24-4.5-3-404 (1976).

²⁷378 N.E.2d at 920-21.

²⁸IND. CODE § 24-4.5-3-105 (Supp. 1979).

loan.”²⁹ The court erred, however, in placing upon the debtor the burden of affirmatively pleading and proving that the attorney’s fees were paid to a salaried employee of the lender.³⁰ The decision also failed to reveal whether the agreement for attorney’s fees was by its terms limited to “reasonable” attorney’s fees and to a non-salaried employee, a requirement expressly imposed by the Code in the case of consumer loans.³¹

In other recent decisions, a not-for-profit hospital was held not to be a creditor subject to the Truth in Lending Act,³² savings banks were permitted to accept and service checking drafts,³³ and a town was entitled to a branch bank in the interest of securing competition for the only other bank in the community.³⁴ The second decision was based upon administrative practice, and the third was founded upon a principle of sound economics widely respected outside banking circles, at least. Finally, a decision by the United States Supreme Court permitted national banks located in one state to charge the maximum interest allowable under the laws of that state upon any loan with respect to out-of-state charges by out-of-state borrowers upon the bank’s credit card.³⁵ The interest was allowed even though it exceeded charges permitted by the state of the borrower.

B. Real Estate Transactions

1. Effect of Grantee’s Promise to Execute a Mortgage; Vendor’s Lien.—An unpaid vendor of land with a claim for the pur-

²⁹*Id.* It is doubtful that the debtor’s interest in the case of a second mortgage will ever be substantial in relation to the loan unless the debtor’s interest, less prior liens at the time of the second mortgage loan, exceeds the amount of the loan. Traditional banking practice recognizes real estate security as substantial only when its worth exceeds the loan by a fair margin. *E.g.*, *id.* § 28-1-13-7 (1976 & Supp. 1979) (allowing banks to invest in real estate when loan does not exceed two-thirds of its value).

³⁰378 N.E.2d at 920-21. Since all of the facts establishing that the attorney representing the lender are within the peculiar knowledge of the lender, placing the burden of pleading upon the debtor is both unfair and unsupported by authority.

³¹One of the purposes of the U.C.C.C. was to require full disclosures to debtors. IND. CODE § 24-4.5-3-404 (1976) clearly authorizes the agreement when it provides that the fees are “reasonable,” incurred “after default,” and referred “to an attorney not a salaried employee of the lender.” Because of the off-hand, careless way in which the issue was handled in this case, it is difficult to understand why *amicus curiae* was limited to another issue in the case. 378 N.E.2d at 917 n.1. On the matter of attorney’s fees, the case is a bad one and should not be followed.

³²*Bright v. Ball Memorial Hosp. Ass’n*, 463 F. Supp. 152, 155 (S.D. Ind. 1979) (construing 15 U.S.C. §§ 1601-1677 (1976) (as amended)).

³³*Terre Haute Sav. Bank v. Indiana State Bank*, 380 N.E.2d 1288 (Ind. Ct. App. 1978) (upholding decision of the Indiana Department of Financial Institutions); *accord*, IND. CODE § 28-6-1-16.5(a)(5) (Supp. 1979).

³⁴*Department of Financial Insts. v. Wayne Bank & Trust Co.*, 385 N.E.2d 482 (Ind. Ct. App. 1979) (reversing finding of the Indiana Department of Financial Institutions).

³⁵*Marquette Nat’l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978).

chase price retains an equitable vendor's lien which, if unperfected, will be defeated by a bona fide purchaser.³⁶ The vendor's lien does not arise in favor of a seller of personal property.³⁷ But suppose that upon termination of a partnership, land owned by the partnership is conveyed by the partnership to one of the partners for an executory consideration payable to the other. Does the latter have a vendor's lien as security for the unpaid price? *Prell v. Trustees of Baird & Warner Mortgage & Realty Investors*,³⁸ dealt with this problem and the clever contention that because this amounted to a sale of a partner's interest in partnership land, which is personal property, no vendor's lien arose.³⁹ Without deciding the vendor's lien issue, the court held that when real or personal property is obtained in exchange for the grantee's written executory promise to execute a mortgage on the described property, the transaction constitutes an equitable mortgage which may be enforced by the vendor in equity.⁴⁰ The court recognized that the equitable mortgagee's interest could be perfected by proper recordation of the contract in the miscellaneous records following recordation of the deed, so that a subsequent bona fide purchaser from the vendee would be charged with constructive notice of the vendor's equitable mortgage as defined in the contract.⁴¹ The case simply recognizes that a grantor

³⁶See Townsend, *Secured Transactions and Creditors' Rights*, 1975 *Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 305 (1975).

³⁷*Johnson v. Jackson*, 152 Ind. App. 643, 284 N.E.2d 530 (1972). Thus, a seller of goods on credit has no lien upon the goods sold unless a security interest is retained. Cf. *First Nat'l Bank of Elkhart County v. Smoker*, 153 Ind. App. 71, 286 N.E.2d 203 (1972) (recognizing right of seller to rescind in case of voidable title in certain cases).

³⁸386 N.E.2d 1221 (Ind. Ct. App. 1979).

³⁹*Id.* at 1225. In a parallel situation, *Huffman v. Foreman*, 163 Ind. App. 263, 323 N.E.2d 651 (1975), held that a vendee releasing or conveying his interest in a land contract for an executory consideration held a vendor's lien for the unpaid price. This problem is discussed in Townsend, *supra* note 36, at 307-09, suggesting that a mortgagee releasing his rights (otherwise considered as personal property) should also have a vendor's lien for the unpaid consideration. Similar considerations should apply to a partner releasing his rights in partnership realty to other partners for an executory consideration, especially when the agreement is part of a termination arrangement between the grantor-partnership and grantee-partner.

⁴⁰386 N.E.2d at 1227-28. A contractual promise to execute a mortgage, if in writing and meeting formal requirements and for an executed consideration, will generally be specifically enforced in equity when performance becomes due. *Hamilton v. Hamilton*, 162 Ind. 430, 70 N.E. 535 (1904); *Brown v. Brown*, 103 Ind. 23, 2 N.E. 233 (1885). An unwritten promise to execute a mortgage, however, falls within the Statute of Frauds. *Irwin v. Hubbard*, 49 Ind. 350 (1874).

⁴¹386 N.E.2d at 1228. The court did not actually decide that the recordation of the prior contract to execute a mortgage in favor of the vendor-partner, after the execution and recordation of the absolute deed conveying the property to the vendee, would constitute constructive notice of the equitable mortgage. This was left to determination by the lower court upon facts which showed that the contract was "placed in the Miscellaneous Drawer," leaving open possible questions of whether or not the contract was in recordable form and recorded in the proper records. The court did decide that

who executes a deed pursuant to a contract binding the grantee to execute a mortgage on the property, as security for the executory consideration promised to him, holds an equitable mortgage—not a vendor's lien.⁴² Assuming that the contract is in recordable form and properly recorded, the grantor holds a perfected interest of which subsequent purchasers are charged with constructive notice.⁴³

2. *Conditional Sales Contracts—Forfeiture.*—A vendor under a real estate conditional sales contract was denied forfeiture as a remedy when the purchaser of agricultural land had paid nearly thirty percent of the price. Pursuant to the now nationally famous case of *Skendzel v. Marshall*,⁴⁴ the Indiana Supreme Court in *Morris v. Weigle*⁴⁵ ordered the vendor to proceed with his remedy of foreclosure, analogizing his interest to that of a mortgagee who is

the lower court erred in holding that the only method of perfecting a vendor's lien was through lis pendens notice, as permitted by *Union State Bank v. Williams*, 348 N.E.2d 683 (Ind. Ct. App. 1976) (holding that a vendor's lien was perfected when the executory consideration for it was recited in the deed). 386 N.E.2d at 1228. If the contract had been properly recorded, it seems that it should serve as constructive notice of the defeasance in favor of the grantor-partner. See IND. CODE § 32-1-2-17 (1976). Recordation of a land contract in recordable form between grantor and grantee, after recordation of the deed executed pursuant to the contract, is constructive notice that the consideration for the deed is executory. Purchasers after recordation of the contract are thus put on notice of the vendor's lien. *Case v. Bumstead*, 24 Ind. 429 (1865). It seems that a contract to execute a mortgage is properly recorded in the miscellaneous records, although no statute makes this clear. Compare IND. CODE § 17-3-39-2 (1976), and *id.* § 32-1-2-32, with *id.* § 32-1-2-31. Other statutes provide for a separate deed record and separate mortgage record. *Id.* § 17-3-39-5. Cases in which it was held that an instrument must be recorded in the proper record in order to serve as constructive notice are archaic and should be discarded, especially in view of modern statutes permitting the use of a single record. Compare *id.* §§ 17-3-3-1 to -4 with *Sinclair v. Gunzenhauser*, 179 Ind. 78, 98 N.E. 37 (1912) (deed recorded in miscellaneous records ineffectively recorded).

⁴²Whether expressed in the conveyance or created by contract with the conveyance, the creation of the lien by express reservation or by contract is inconsistent with a vendor's lien which arises by implication of law. *Lucas v. Hendrix*, 92 Ind. 54 (1883).

⁴³A grantor may by express language reserve a mortgage in the instrument of transfer, in which case the lien is perfected with or without recording of the deed. *Warford v. Hankins*, 150 Ind. 489, 50 N.E. 468 (1898). Of course the lien may be perfected by suit and lis pendens notice. *Union State Bank v. Williams*, 348 N.E.2d 683 (Ind. Ct. App. 1976). The grantor's possession should constitute perfection against purchasers becoming such while he is in possession. See *Townsend*, *supra* note 36, at 305-07.

⁴⁴261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974). *Skendzel v. Marshall* has been recognized as a leading case in at least two nationally recognized casebooks. See K. YORK & J. BAUMAN, *REMEDIES CASES AND MATERIALS*, 974 (3d ed. 1979); J. CRIBBET & C. JOHNSON, *CASES AND MATERIALS ON PROPERTY*, 1115 (4th ed. 1978).

⁴⁵383 N.E.2d 341 (Ind. 1978).

limited to judicial foreclosure.⁴⁶ In reaching this conclusion, the court overruled the court of appeals,⁴⁷ which earlier had found that the purchaser, who continued to farm the property through a tenant, had abandoned the property when he failed to pay an annual installment because of a breakdown in communications during his stay in Brazil as a representative of the United States Government and Purdue University.⁴⁸ A dissent by two members of the court⁴⁹ is sad because it ignores forty years of developing contract and commercial law that has succeeded in putting good faith and fairness in the market place.

3. *Release of Mortgage or Lien; Accord and Satisfaction.*—A debtor may execute a deed of mortgaged or lien property to the mortgagee or lienholder in satisfaction of the underlying indebtedness.⁵⁰ In *Homemakers Finance Service, Inc. v. Ellsworth*,⁵¹ the mortgagor executed and delivered a deed to the mortgagee with a recital that the deed was “accepted in full satisfaction of any and all sums due and owing from the grantor to the grantee.”⁵² In an action upon the indebtedness and the mortgage for foreclosure, the court held that the mortgagor carried the burden of proving payment⁵³ and that proof of mere delivery of the deed and keys to the property was not sufficient to establish a prima facie case of acceptance of the terms.⁵⁴ In short, the debtor may not make a prima facie case of payment by deeding the collateral to the lienholder with a stipulation that the deed is in full settlement of all debts. He must come forth with other evidence establishing the grantee’s assent by a response, such as his assumption of possession of the collateral, the creditor’s expressed assent to its terms, or recordation of the conveyance.⁵⁵

4. *Foreclosure.*—A summary judgment in favor of a mortgagee in a foreclosure action, to which the mortgagor unsuccessfully asserted a counterclaim for breach of a promise to loan, was held to

⁴⁶*Id.* at 342.

⁴⁷375 N.E.2d 677 (1978), discussed in Townsend, *Secured Transactions and Creditors’ Rights*, 1978 *Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 289, 294-95 (1979).

⁴⁸375 N.E.2d at 679.

⁴⁹383 N.E.2d at 345 (Pivarnik, J., & Givan, C.J., dissenting).

⁵⁰*Lamb v. Thieme*, 367 N.E.2d 602 (Ind. Ct. App. 1977); *Black v. Krauss*, 119 Ind. App. 529, 85 N.E.2d 647 (1949).

⁵¹380 N.E.2d 1285 (Ind. Ct. App. 1978).

⁵²*Id.* at 1287.

⁵³*Id.* Although the mortgagor did not affirmatively plead payment as required by IND. R. TR. P. 8(c), the court allowed the issue to be raised at the trial.

⁵⁴*Id.* at 1287.

⁵⁵For a case in which payment was proved by an admission of the lienholder who took a transfer of collateral, see *Lamb v. Thieme*, 367 N.E.2d 602 (Ind. Ct. App. 1977).

constitute a bar as *res judicata* in a later action to enforce the alleged promise.⁵⁶

C. *Security Interests in Personal Property*

1. *Proceeds; Setoff; Security Interests and Transactions Excluded by Article 9.*—A security interest in collateral extends to proceeds received for the property which, if perfected in the original, continues to be perfected in identifiable proceeds.⁵⁷ If the proceeds consist of negotiable documents, chattel paper, or instruments received in exchange, special rules deal with priorities between the secured party and transferees of the paper or instruments.⁵⁸ If proceeds are made up of money, land, bank accounts, insurance or other collateral either excluded or not covered by Article 9 of the Code,⁵⁹ however, a serious problem of priorities arises between the secured party on one side and a transferee of these kinds of proceeds.⁶⁰ A similar problem is posed when the transferee of proceeds claims a right of setoff, which is also excluded from the provisions of Article 9. In an effort to resolve this conflict with

⁵⁶*Richards v. Franklin Bank & Trust Co.*, 381 N.E.2d 115 (Ind. Ct. App. 1978). Failure of the court to make findings as required by Trial Rule 56 without challenge on a motion to correct error or an appeal was held not to effect the finality and validity of the judgment. *Id.* at 118. The court also held that where total judgment as distinguished from partial summary judgment was entered, findings were not required. *Id.*

⁵⁷U.C.C. § 9-306(3) [hereinafter referred to as the Uniform Commercial Code or Code]. If the original security interest is not perfected by a financing statement covering "proceeds," the security in proceeds is lost unless perfected within 10 days after receipt by the debtor. *Id.*

⁵⁸U.C.C. §§ 9-308, -309 (protecting a holder in due course of a negotiable instrument; a bona fide purchaser of a security; a negotiatee of a negotiable document; a purchaser of chattel paper and non-negotiable instruments who gives new value without knowledge in regular course; and a purchaser of chattel paper for new value in the regular course of business with or without knowledge).

⁵⁹Exclusions are listed in U.C.C. § 9-104, including, in addition: landlord's liens; statutory liens; wages; equipment trusts; certain sales of accounts, chattel paper and contract rights; judgments; interests in real estate other than fixtures; and tort claims. Money is not specifically dealt with by the Code, but by definition "goods" does not include money. U.C.C. § 9-105(1)(f).

⁶⁰Some courts hold that priorities between a secured party claiming deposits in a bank account as proceeds and the rights of the bank are determined by common law principles. *See, e.g., Middle Atl. Credit Corp. v. First Pa. Banking & Trust Co.*, 199 Pa. Super. Ct. 456, 185 A.2d 818 (1962). *Cf. Commercial Discount Corp. v. Milwaukee W. Bank*, 61 Wis. 2d 671, 214 N.W.2d 33 (1974) (innocence of bank in asserting setoff for loan made before proceeds were deposited held to be irrelevant and setoff denied). It has been indicated that the 1972 proposed amendments to the Code which recognize that proceeds traced to a bank account are covered by a security agreement will be governed by priority rules of Article 9—at least to the extent of denying the bank a right of setoff of a prior debt. *See Domain Indus., Inc. v. First Sec. Bank & Trust Co.*, 230 N.W.2d 165 (Iowa 1975). However, the new law, which Indiana has not yet adopted, does not regulate priorities between setoff and proceeds deposited in a bank account.

respect to setoff, Judge Garrard in *Citizens National Bank v. Mid-States Development Co.*⁶¹ boldly amended the Code by holding that priorities between the secured party claiming funds in a bank account and the bank's claim of setoff would be determined by Article 9.⁶² Priority was given to the prior perfected security interest in an egg inventory covering proceeds which were deposited in a bank account as against a setoff asserted by the bank upon a previously incurred obligation owing by the debtor to the bank.⁶³ The bank was apparently aware of the secured party's claim to the proceeds.⁶⁴ In reaching its decision, the court relied upon the general validation provision of Article 9: "Except as otherwise provided by this act . . . a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors."⁶⁵ Although the court reached a correct solution, its reasoning is questionable because the first clause of the validation section was ignored. When proceeds consist of collateral which is not covered or excluded by Article 9, it seems clear that as between debtor and secured party, the security interest should be recognized.⁶⁶ But priorities between the secured party and third parties who deal with the proceeds remain to be determined by common law principles, influenced in a large part by business practice and analogy to Code Rules.⁶⁷ For example, had the bank in good faith made a fresh

⁶¹380 N.E.2d 1243 (Ind. Ct. App. 1978).

⁶²*Id.* at 1248.

⁶³*Id.* at 1248-49.

⁶⁴Shortly after the setoff was asserted, the debtor filed in bankruptcy under Chapter XI. For some unexplained reason, the bank funds of over \$100,000 never became a part of the bankruptcy estate, presumably because the security interest was valid as against the trustee or the setoff was not challengeable as a preference. Actually, the funds should have passed to the trustee as a preference, in which case the claim of the secured party should have been denied under U.C.C. § 9-306(4), because proceeds deposited in a bank account are limited to net proceeds deposited within 10 days before bankruptcy. See *Fitzpatrick v. Philco Fin. Corp.*, 491 F.2d 1288 (7th Cir. 1974), discussed in Townsend, *Secured Transactions and Creditors' Rights*, 1974 *Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 234, 245-47 (1974).

⁶⁵380 N.E.2d at 1248 (quoting IND. CODE § 26-1-9-201 (1976)).

⁶⁶Dissent upon this point is almost totally lacking in the case law. Security interests in collateral included in Article 9 also cover proceeds even when the proceeds are of a form excluded from Article 9. *Domain Indus., Inc. v. First Security Bank & Trust Co.*, 230 N.W.2d 165 (Iowa 1975) (setoff); *Commercial Discount Corp. v. Milwaukee W. Bank*, 61 Wis. 2d 671, 214 N.W.2d 33 (1974) (setoff). An expectancy in a lawsuit recovery is included in Article 9 even though the right to recovery after judgment is not so included. *In re Estate of Hill*, 27 Or. App. 893, 557 P.2d 1367 (1976). Pre-Code law recognized that a security interest in a note and mortgage becoming real estate upon foreclosure continued in the land. *Walner v. Capron*, 224 Ind. 267, 66 N.E.2d 64 (1946) (as between lender and debtor, the collateral was treated as retaining its original character).

⁶⁷See U.C.C. § 1-103.

advance to the debtor after deposit of the proceeds, a good argument for giving the bank priority can be made, either upon common law principles,⁶⁸ a theory analogous to the super priority accorded to a purchase money security interest under the Code,⁶⁹ or the Code rule allowing account debtors to interpose their claims arising before notification by the secured party.⁷⁰ If proceeds consist of money, a bona fide purchaser taking possession should be protected over a prior security interest whether it is perfected or not.⁷¹ A similar result should follow when proceeds are traced to land—purchasers being protected under rules applicable to real estate transactions.⁷²

Another convoluted series of problems will arise when a transferee of collateral excluded from Article 9 claims a right to proceeds as against a later security interest therein.⁷³ Here again the courts

⁶⁸The pre-Code law denied the bank a right of setoff against proceeds when the bank's claim accrued before the funds were deposited. *Peoples State Bank v. Caterpillar Tractor Co.*, 213 Ind. 235, 12 N.E.2d 123 (1938); *Fletcher Am. Nat'l Bank v. Federal Sec. Co.*, 94 Ind. App. 379, 168 N.E. 599 (1929). This conclusion was reached upon the theory that the bank had not changed position or given value. The cases assume that had a fresh advance been made by the bank after the proceeds were deposited, the bank would take priority.

⁶⁹Purchase money types of security interests are given a super priority over prior security interests in a number of situations. U.C.C. §§ 9-312(3), (4). Similar rules give a super priority to work and additions furnished by artisans and to security interests in fixtures and accessions. U.C.C. §§ 9-310, -313, -314.

⁷⁰While a depository bank is not an "account debtor," the position of the bank is almost identical. *See Rowland v. American Fed. Sav. & Loan Ass'n*, 523 S.W.2d 207 (Tenn. Ct. App. 1975). Under § 9-318, a security interest in accounts, contract rights, general intangibles, and possibly chattel paper is taken subject to the account debtor's claims against the debtor if they arise out of the transaction or accrue before notification. *Chase Manhattan Bank v. State*, 40 N.Y.2d 590, 357 N.E.2d 366 (1976). The bank is protected if it pays proceeds to the debtor or his designee unless the secured party complies with the adverse claim statute. IND. CODE § 28-1-20-1 (Supp. 1979). *Cf.* U.C.C. § 4-303 (rule for determining priority for notice, stop-order, legal process, and setoff).

⁷¹*E.g., compare Transamerica Ins. Co. v. Long*, 318 F. Supp. 156 (W.D. Pa. 1970) (thief paying taxes with stolen money passed good title to the United States), *with Porter v. Roseman*, 165 Ind. 255, 74 N.E. 1105 (1905) (creditor taking stolen money in payment not a purchaser for value cutting off rights of owner).

⁷²The common law rule was that an owner of converted personal property could trace it to real estate, and that a bona fide purchaser of the real estate would cut off his claim. *Metropolitan Cas. Ins. Co. v. S.J. Peabody Lumber Co.*, 99 Ind. App. 307, 192 N.E. 323 (1934) (owner of funds defeated by person acquiring mechanic's lien upon land in which funds invested). Judgment lien creditors, however, would not prevail. *Cf., Moore v. Thomas*, 137 Ind. 218, 36 N.E. 712 (1894) (judgment is a lien only on the judgment debtor's interest in realty and is subject to all equities in favor of third parties).

⁷³*Cf. McIlroy Bank v. First Nat'l Bank*, 252 Ark. 558, 480 S.W.2d 127 (1972) (security interest in note converted to judgment). A war of priorities will also arise between security interests in collateral which are excluded from the Code because another person claims a statutory lien, a landlord's lien, or an account, contract right or chattel paper under a transfer excluded by the Code. *See* U.C.C. § 9-104(b), (c), (f). Thus, priorities between a security interest in goods on which a conflicting landlord's

must turn to common law and principles derived from common law, simply because the Code did not choose to deal with these kinds of problems.

2. *Liability of Filing Officers and the Commissioner of the Bureau of Motor Vehicles.*—Two decisions recognized the liability of filing recording officers for the negligence of their employees resulting in losses to persons relying upon the proper performance of duties. One case⁷⁴ held that liability could be imposed for giving to the plaintiff incorrect information that no financing statements were outstanding against a debtor.⁷⁵ In the other,⁷⁶ a transferee of a motor vehicle recovered from the Indiana Bureau of Motor Vehicles and its commissioner for failure to note upon the certificate of title an alleged lien against the original owner. Although it appeared that the debtor had executed no security agreement,⁷⁷ the court imposed liability for the amount of a previous judgment procured by the alleged secured party against the transferee.⁷⁸

The conclusion of the court that the failure to include the lien upon the title was the proximate cause of a substantial, and questionable, judgment, to which the bureau and the commissioner were

lien is claimed are resolved by common law principles, including analogy to Code principles. *Peterson v. Ziegler*, 39 Ill. App. 3d 379, 350 N.E.2d 356 (1976).

⁷⁴*Mobile Enterprises, Inc. v. Conrad*, 380 N.E.2d 100 (Ind. Ct. App. 1978). In this case the secretary of state, the director of the Uniform Commercial Code Division, and their bondsman were named as parties defendant.

⁷⁵*Id.* at 104. Advice was given over the telephone despite the administrative rule that filing information is not required to be given by telephone. IND. ADMIN. RULES & REGS. Rule (26-1-9-408)-10 (Burns 1976). The court reversed the lower court's dismissal of the complaint and returned the case for determination of the issues of negligence and contributory negligence. 380 N.E.2d at 104.

⁷⁶*VanNatta v. Crites*, 381 N.E.2d 532 (Ind. Ct. App. 1978). *Cf.* *National Bank & Trust Co. v. United States*, 589 F.2d 1298 (7th Cir. 1978) (United States not liable to the secured party for seizure and sale of a motor vehicle when the purchaser was erroneously given a clear certificate of title by the Bureau of Motor Vehicles), *discussed in text* accompanying note 117 *infra*.

⁷⁷The alleged lienholder in this case had given the motor vehicle to his granddaughter as a wedding present. A lien for \$1000 in favor of her father was noted on the title which was then transferred to the donee. A new certificate was issued over the signature of the donee and her husband when they applied for a title, with the application showing no liens. The Bureau of Motor Vehicles overlooked the lien on the title and issued a clear certificate which was ultimately transferred to the plaintiff, who subsequently brought suit against the commissioner. The court failed to consider that the notation of a lien on the title by the secured party is insufficient as a security agreement. *See White v. Household Fin. Corp.*, 158 Ind. App. 394, 302 N.E.2d 828 (1973).

⁷⁸381 N.E.2d at 539. The judgment in favor of the secured party in this case was thus erroneous. Although the court did not admit the judgment as proof of its correctness, the court seemed to hold it relevant for the purpose of showing that as a result of the negligence of the bureau, the purchaser of the vehicle was put to a lot of trouble. Damages thus should have been limited to the trouble resulting, such as attorney's fees, rather than the amount of the judgment.

not parties, is unique. The court implies that an official who neglects to record a spurious lien is proximately responsible to a purchaser for the risks and trouble of an ensuing lawsuit successfully or unsuccessfully pursued against him.⁷⁹ Because the state is liable for its employees in these cases, the imposition of vicarious liability upon department heads not otherwise at fault conflicts with basic agency principles.⁸⁰ To the extent that these cases impose liability upon supervising officers or employees solely on the basis of their vicarious responsibility for acts of employees, both cases are wrong.

Current legislation has added to the burdens of the Bureau of Motor Vehicles by requiring tax liens to be recorded upon its records and titles,⁸¹ and odometer readings to be furnished on title transfers.⁸² New legislation also allows the bureau to require an individual applying for a certificate of title to include his social security number.⁸³

3. *Miscellaneous Decisions.*—A promise by an auto franchiser to the bank financing the inventory of a franchisee that the franchiser would repurchase current models if the franchise were terminated created a third party beneficiary contract right in the franchisee to compel the franchiser to take back the vehicles.⁸⁴ For tax purposes, gross income is not received by a seller of goods to the extent that the buyer assumes a security interest or lien upon the property.⁸⁵ The insurer is under no duty to give a conditional buyer of land notice of the expiration of an insurance policy, but such a duty may rest with the agent.⁸⁶ Two decisions⁸⁷ indicate that when, as between

⁷⁹*Id.* at 538. A new form of action, negligent disparagement of title by omission, seems to have been invented. Sparse precedent on the subject limits liability to intentional torts disparaging title or property. *E.g.*, *May v. Anderson*, 14 Ind. App. 251, 42 N.E. 946 (1895).

⁸⁰An agent is not vicariously liable for the acts of a subagent under him. RESTATEMENT (SECOND) OF AGENCY § 358 (1957). The position of this writer on the subject is discussed in Townsend, *Secured Transactions and Creditors' Rights*, 1977 *Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 253, 262-65 (1978).

⁸¹IND. CODE § 6-8-3-17 (Supp. 1979). The bureau is required to check lists of unpaid tax warrants for gross income, sales, use, and adjusted gross income taxes, and enter a lien upon the title of any assignee thereof.

⁸²*Id.* § 9-1-2-1.

⁸³*Id.* § 4-1-8-1.

⁸⁴*Fiat Distribs., Inc. v. Hidbrader*, 381 N.E.2d 1069, 1071 (Ind. Ct. App. 1978).

⁸⁵*Indiana Dep't of State Revenue v. Northern Ind. Steel Supply Co.*, 388 N.E.2d 596 (Ind. Ct. App. 1979) (no tax payable when purchase paid or settled with secured party).

⁸⁶*Augustine v. First Fed. Sav. & Loan Ass'n*, 384 N.E.2d 1018, 1021 (Ind. 1979) (holding in fact that in a suit by the vendee against the insurance agent, the latter could not implead and hold the insurer liable). This decision also invented a technical and bad rule to the effect that depositions must be "published" before they may be considered for purposes of summary judgment. *Id.* at 1020. Lawyers should take note of the rule, however controversial it may be.

⁸⁷*Morsches Lumber, Inc. v. Probst*, 388 N.E. 2d 284 (Ind. Ct. App. 1979) (agree-

two parties with a common risk, one agrees to procure insurance, ensuing insurance coverage has the implied effect of limiting the liability of each for negligence to the other. Application of this principle did not concern, in these cases, lienholder and debtor, but the principle may reach this far.⁸⁸ The court of appeals recognized that a security interest may be created in future rents to be earned under an existing lease.⁸⁹

D. Creditors' Rights

1. *Collections Practices*.—The arsenal of remedies available to creditors was enlarged by *Kaletha v. Bortz Elevator Co.*,⁹⁰ authorizing debtor harassment by publication of deadbeat status in the most vulnerable way—to business associates and clients. Another unfortunate decision, *Martin v. Platt*,⁹¹ encourages another form of extrajudicial witness harassment by allowing a supervisor to discharge employees who reported to superiors the supervisor's criminal conduct in taking kickbacks. Not only do these decisions reflect a shortage of legal research,⁹² they also exhibit a lack of humanitarian considerations which make bankruptcy a way of life and unionization the main tool of employee protection.

2. *Mechanics' Liens*.—Three fairly clear issues are settled by Indiana law governing construction contracts. One is that a prime contractor's subcontractor cannot recover a personal judgment from

ment of contractor to insure barn being built for owner); *Woodruff v. Wilson Oil Co.*, 382 N.E.2d 1009 (Ind. Ct. App. 1978) (lease agreement requiring lessor to insure).

⁸⁸These cases are tied to the rule that if one of the parties procures insurance for the benefit of both, the insurer paying one of them should not be allowed to subrogate against the other who is at fault. This principle may be applicable to the lienholder-debtor relationship as well. See *Lititz Mut. Ins. Co. v. Barnes*, 248 F.2d 241 (5th Cir. 1957) (insurer had no right of subrogation against mortgagor).

⁸⁹*In re Estate of Smith*, 388 N.E. 2d 287 (Ind. Ct. App. 1979). This is one of the few Indiana cases recognizing a lien in future rents. For another aspect of this case, see notes 176-78 *infra* and accompanying text.

⁹⁰383 N.E.2d 1071 (Ind. Ct. App. 1978). The act of the creditor in writing to the debtor's business client was held not to be "outrageous," a requirement which the court held to be an essential element of the tort of intentional infliction of emotional distress. *Id.* at 1075.

⁹¹386 N.E.2d 1026 (Ind. Ct. App. 1979). The employees who were fired by the supervisor for reporting his taking of kickbacks brought suit against the employer and the supervisor. Summary judgment was sustained because the employment was at will and no damages could be shown. *Id.* at 1028.

⁹²The first decision was based upon a law review article written by a prominent authority in 1939. 383 N.E.2d at 1075 (citing Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939)). The second decision ignored the significant array of authority in other jurisdictions allowing damages to an employee at will injured by a defendant who induced his employer to discharge the employee without justification. *E.g.*, Annot., 26 A.L.R.2d 1227 (1952).

the owner for unpaid performance when there is no privity of contract between the owner and the subcontractor.⁹³ This rule was illustrated by *Indianapolis Raceway Park, Inc. v. Curtiss*,⁹⁴ in which a tenant, as a part of its rent, agreed with the landlord to install lighting on the property. When the tenant's contractor (the subcontractor) was not paid, he failed to perfect a mechanic's lien on the property but later sued the landlord in unjust enrichment. Recovery was denied because the evidence failed to show that the work was requested by the landlord, that the subcontractor expected the landlord to pay, that a wrong was committed, or that the landlord actively assented.⁹⁵ Another settled issue is that the subcontractor may assert a nonpromissory lien upon the owner's interest in the land benefited to the extent of the reasonable value of his performance rendered to the prime contractor, provided he properly complies with and records notice of his lien under the mechanic's lien statute.⁹⁶ The third rule is that if the owner promises to pay the subcontractor for his performance and if the promise is supported by consideration, he will be responsible to the subcontractor. Accordingly, the owner promising to pay a subcontractor who, in reliance thereon, failed to record his otherwise valid mechanic's lien, has been held liable upon his promise on a theory of promissory estoppel.⁹⁷ This third principle was ignored in *Hormuth Drywall & Painting Service, Inc. v. Erectioneers, Inc.*⁹⁸ wherein the subcontractor, in reliance upon the owner's promise, had failed to record his lien.⁹⁹ Liability of the owner was denied due to his unilateral belief that the subcontractor had no lien because the prime was operating

⁹³See *Glick v. Seufert Constr. & Supply Co.*, 342 N.E.2d 874 (Ind. Ct. App. 1976) (promise to plumber's subcontractor not inferred when the general contractor said he would "try to help [the sub] get his money").

⁹⁴386 N.E.2d 724 (Ind. Ct. App. 1979) (citing extensive authority).

⁹⁵*Id.* at 727. It is generally recognized that an owner or landlord actively assenting to construction work may have his interest in the land subjected to a lien. *E.g.*, *Mann v. Schnarr*, 228 Ind. 654, 95 N.E. 2d 138 (1950). Liability in such cases is predicated upon estoppel or change of position and not necessarily upon a theory of unjust enrichment. It should also be noted that this kind of estoppel and unjust enrichment liability involves different concepts. 386 N.E.2d at 727.

⁹⁶IND. CODE § 32-8-3-1 (Supp. 1979). A lien may be claimed as far removed from the owner as a subcontractor of a subcontractor. *Stephens v. Duffy*, 41 Ind. App. 385, 83 N.E. 268 (1908).

⁹⁷*Lawshe v. Glen Park Lumber Co.*, 375 N.E.2d 275 (Ind. Ct. App. 1978), *discussed in* Townsend, *supra* note 47, at 306-07.

⁹⁸381 N.E.2d 490 (Ind. Ct. App. 1978). The case actually involved the claim of the subcontractor of a subcontractor against the prime contractor and the owner, who had orally promised that they would assist the former to collect from the first subcontractor who had defaulted.

⁹⁹The uncontested evidence suggested an implied promise either to pay or to assist with collection. *Id.* at 492.

under a no-lien contract.¹⁰⁰ The no-lien contract, however, was ineffective with respect to the subcontractor because it was not recorded. The case will go down in history as one of the few instances in which the court refused to enforce a promise because of the unilateral mistake of the promisor that facts were not present which would induce acceptance or reliance thereon. In its anxiety to uphold the lower court decision, the court also refused to consider the claim of a third party beneficiary contract between the prime and the owner for the benefit of the subcontractor because it was not raised in the pleadings.¹⁰¹ This case should not have been published.

Notice of intent to hold a mechanic's lien must be given by subcontractors to an owner who occupies or intends to occupy the property as a resident within time limits provided by the mechanic's lien statute.¹⁰² *Wiggin v. Gee Co.*¹⁰³ dealt with what appeared to be a subcontractor furnishing materials to a contractor who was building an addition to the occupied home of the owner for purposes of a child day care center. The owner was not given notice of the intent to hold a lien on the property, and the subcontractor duly perfected a mechanic's lien for unpaid materials furnished to the contractor on the job. The female owner, who had paid most of the contract price to the contractor, objected. The court held that because the day care center was not a "family dwelling," the statutory notice was not required to be given the owner.¹⁰⁴ If the case stands, it seems that a homeowner paying his contractor for paving his driveway is not entitled to notice from the subcontractor if the driveway is to be used wholly or partially for an automobile used in the homeowner's business. As a precedent, the case stands out as an absurdity for its failure to consider the predominant use of the property, and to some it will be regarded as a kind of sexist opinion, inasmuch as it discourages home employment.¹⁰⁵ The statute is intended to protect the homeowner from unexpected liens after he pays the prime contractor, unless he is given notice of the intended lien shortly after the work commences. This case qualifies only a pure domestic as a homeowner, a requirement more restrictive than the statute itself.¹⁰⁶

¹⁰⁰*Id.*

¹⁰¹*Id.*

¹⁰²IND. CODE § 32-8-3-1 (Supp. 1979). The 1978 version is discussed in Townsend, *supra* note 47, at 305.

¹⁰³386 N.E.2d 1218 (Ind. Ct. App. 1979).

¹⁰⁴*Id.* at 1220.

¹⁰⁵The dissent appears to agree with this assessment. *Id.* at 1220-21 (Garrard, J., dissenting).

¹⁰⁶The statute also applies to a *double* as well as a single occupancy dwelling. IND. CODE § 32-8-3-1 (Supp. 1979).

Other mechanic's lien cases permitted recovery of attorney's fees in foreclosure cases,¹⁰⁷ recognized that foreclosure of a person's interest is without jurisdiction unless he is made a party,¹⁰⁸ placed criminal liability for deception on a contractor who had received payment after signing a false statement that all subcontractors had been paid,¹⁰⁹ and denied enforcement of a lien when the lienholder failed to carry his burden of proof that notice of the lien was recorded within sixty days after the last work or materials are furnished, as required by statute.¹¹⁰ The latter case exemplifies the burden carried by the party with the burden of proof on appeal when the trier of fact has determined the facts against him below, a matter of great importance to contractors who sometimes must establish each detail of their claim. The decision on the one side allowed the trier of fact to deny proof of services and materials when invoices were delivered and accepted without objection, and on the other side permitted the trier to treat similar invoices determinative as an account stated and even allowed the court to ignore time cards and invoices establishing performance within recordation time as "incidental."¹¹¹ The need for careful and documented recordkeeping by contractors cannot be better illustrated.

3. *Liens of Federal Government.*—It has long been an accepted rule that a prior inchoate lien, valid under state law against subsequent parties, will be defeated by a contractual security interest taken in the property by or on behalf of the United States government. This rule has often been applied to defeat mechanic's and artisan's liens and security interests covering advances after the federal security interest attached, which would otherwise take priority under state law.¹¹² The Supreme Court, in *United States v. Kimbell Foods, Inc.*,¹¹³ rejected the doctrine and held that a contractual lien of the government under the Small Business and the

¹⁰⁷*Fox v. Galvin*, 381 N.E.2d 103 (Ind. Ct. App. 1978). For a discussion of another issue in this case, see note 204 *infra* and accompanying text.

¹⁰⁸*Id.*

¹⁰⁹*Pappas v. State*, 386 N.E.2d 718 (Ind. Ct. App. 1979).

¹¹⁰*Contech Architects & Eng'rs, Inc. v. Courshon*, 387 N.E.2d 464 (Ind. Ct. App. 1979). See IND. CODE § 32-8-3-1 (1976 & Supp. 1979).

¹¹¹*Id.* at 466.

¹¹²*E.g.*, *Willow Creek Lumber Co. v. Porter County Plumbing & Heating, Inc.*, 572 F.2d 588 (7th Cir. 1978); *McCullough Constr. Co. v. Agricultural Prods. Corp.*, 437 F. Supp. 404 (N.D. Ind. 1977). These cases were criticized in Townsend, *supra* note 47, at 310. These decisions will probably no longer be valid law.

¹¹³99 S. Ct. 1448 (1979). The case recognized that Congress may fix priorities. In reaching its conclusion, the Court noted that the Federal Tax Lien Act of 1966, 26 U.S.C. § 6323 (1976), was enacted with the intent that state law should determine the priority to be given to federal tax liens unless its application would impair federal operations. 99 S. Ct. at 1463-64.

Farmers Home Administrations should be governed by priorities under state law.¹¹⁴ Because the government under these programs was operating in an established area of commercial law and because there was no need for a uniform federal rule, priorities should be governed by local law which does not discriminate against the United States.¹¹⁵ State law was applied to give priority to a security interest in inventory perfected before the lien securing a government loan arose, but covering a future indebtedness and collateral acquired after perfection of the insured loan, and to an artisan's lien upon farm equipment over a prior perfected security interest claimed by the government.¹¹⁶ This is a landmark decision worthy of careful study by commercial lawyers who will welcome the government as an equal partner when it engages in commercial affairs.

The Seventh Circuit held¹¹⁷ that the owner of a perfected security interest in a motor vehicle could not recover from the United States for seizing and selling the property under a tax lien junior to the security interest of the secured party who was not given notice of the sale.¹¹⁸ The purchaser acquired only the interest of the debtor, even though he was given a clear certificate of title through an error of the Bureau of Motor Vehicles.¹¹⁹

4. *Judgment Liens*.—Indiana statutes provide that a money judgment may be entered and indexed in the judgment docket, and thereupon it becomes a lien upon all the debtor's land located in the county.¹²⁰ Parasitic legislation¹²¹ allows the state to record in the judgment docket the undertaking of a condemnee and his surety to repay funds withdrawn when exceptions are made to an appraisal in a condemnation case. The state is then given a lien upon all the real estate of the obligor or obligors in the county from the date of recordation. In *State v. Cox*,¹²² the court held that a subsequent purchaser of land from the condemnee, whose undertaking was recorded, took title subject to the state's lien for money to be returned if the judgment should go for less than the appraised amount paid into court.¹²³ The court properly rejected a technical argument that

¹¹⁴99 S. Ct. at 1465.

¹¹⁵*Id.* at 1459.

¹¹⁶*Id.* at 1461.

¹¹⁷*National Bank & Trust Co. v. United States*, 589 F.2d 1298 (7th Cir. 1978).

¹¹⁸*Id.* at 1304.

¹¹⁹*Id.* at 1302.

¹²⁰IND. CODE § 34-1-43-1 (Supp. 1979). The lien continues for 10 years from the time of entry and indexing. *Id.* § 34-1-45-2.

¹²¹IND. CODE § 32-11-1-8 (1976). Other legislation uses the judgment docket as the means of securing liens on real estate. *E.g., id.* § 6-6-2-10(b) (procedure for collecting fuel tax).

¹²²377 N.E.2d 1389 (Ind. Ct. App. 1978).

¹²³*Id.* at 1391.

because the general judgment lien statute required a statement or transcript of a "judgment," recordation of the undertaking¹²⁴ was insufficient to constitute a lien.¹²⁵ Unfortunately, the case cited with approval dictum in a supreme court decision¹²⁶ which overlooked the purpose of the Indiana law requiring the separate filing of a transcript or statement of the judgment.¹²⁷ The clerk is not required to and should not automatically enter judgments in the judgment docket, mainly because the statute in present form was passed to assure that state judgment liens would arise in the same manner as federal judgment liens entered under the same statute.¹²⁸ A contrary interpretation would mean that federal judgments would become judgment liens in the whole judicial district without entry into state records, a fact which accounts for the present form of the Indiana judgment lien statute.

5. *Assets Subject to Creditor Process.*—Most intangible rights cannot be subjected to sale on execution unless given up by the debtor.¹²⁹ However, *Coldren v. American Milling Research & Development Institute, Inc.*¹³⁰ recognized that such property may be subjected to creditor process through proceedings supplemental to execution.¹³¹ In this case, the court held that a debtor's interest in a pa-

¹²⁴However, the case did not consider whether the entry in the judgment docket met the relevant data requirements of the judgment lien statute sufficiently to serve as constructive notice. The general judgment lien statute relevantly requires date of entry and entry under the names of debtors alphabetically. IND. CODE § 34-1-43-1 (1976). Presumably, these requirements had been met.

¹²⁵377 N.E.2d at 1392. It was argued that the interest of the state should have been perfected by filing *lis pendens* notice of condemnation proceedings. The court recognized this as an alternative device for securing the condemnor. *Id.*

¹²⁶*Id.* (citing *Watson v. Strohl*, 220 Ind. 672, 46 N.E.2d 204 (1943)).

¹²⁷The decision was criticized for this dictum in Hurley, *When is a Judgment a Lien?*, 20 IND. L.J. 293 (1945).

¹²⁸Under a congressional statute, federal judgments become liens in the district in which rendered unless states provide for recordation with the same treatment as state judgments. 28 U.S.C. § 1962 (1976); *Rhea v. Smith*, 274 U.S. 434 (1927). It should be pointed out that the practice of clerks to enter judgments in the judgment docket is expensive and needless unless judgment creditors desire the entry to be made. The 1979 legislature unfortunately adopted a statute providing for a judgment docket in Marion County Municipal Court and providing that municipal judgments "shall" be entered therein, thereby becoming liens upon real estate in the county. IND. CODE § 33-6-1-24 (Supp. 1979) (repealing provision requiring plaintiff to file written request for entry). Fairly interpreted, the statute indicates that the "shall" refers to entry as in the case of circuit and superior court judgments in which entry is made only upon application. The statute, however, should be clarified by amendment to make certain that automatic entry is not required.

¹²⁹See IND. CODE § 34-1-36-6 (1976).

¹³⁰378 N.E.2d 870 (Ind. Ct. App. 1978).

¹³¹In this case *A*, the owner of a patent and licensing agreement with *C*, was sued by *B*, who recovered judgment and who purchased the patent and licensing agreement. *B* then moved to dismiss a pending suit by *A* against *C* for breach of the licensing

tent right and licensing agreement with a third person could be subjected to sale in proceedings supplemental to satisfy the claim of a creditor.¹³²

Indiana courts continue to be troubled by the question of whether pension rights are sufficiently vested to be subject to property division in divorce proceedings. In one decision, a pension plan was found to be vested and subject to consideration as property;¹³³ in the other it was not.¹³⁴ Another case recognized, but not without difficulty, that a remainder interest in property vesting before or during marriage is transferable by way of property settlement.¹³⁵ Although these cases involve social issues not usually involved in debtor-creditor relationships, they provide assistance by analogy in defining assets subject to creditor process.¹³⁶

6. *Proceedings Supplemental to Execution.*—In Indiana, a motion to correct error is not required in an appeal from an order in proceedings supplemental to execution.¹³⁷ The time for taking the appeal thus runs from the time of the order.¹³⁸ But suppose that a motion to correct error is filed, and ultimately the court rules against the motion. May an appeal be taken within time limits measured

agreement. The court held that by purchase, *B* became the real party in interest and could dismiss the suit.

¹³²378 N.E.2d at 872.

¹³³*Libunao v. Libunao*, 388 N.E.2d 574 (Ind. Ct. App. 1979) (husband stipulated that interest in Keogh retirement plan was 100% vested and that pension and profit sharing funds were 70% vested; court stated that property division order could consider the future value of unvested pension, but actual distribution must be based on present vested interest?). *Accord, In re Marriage of Hirsch*, 385 N.E.2d 193 (Ind. Ct. App. 1979).

¹³⁴*Goodwill v. Goodwill*, 382 N.E.2d 720 (Ind. Ct. App. 1978) (award for division of husband's railroad retirement pension held improper because husband had no vested right to payment of pension).

¹³⁵*Kuhn v. Kuhn*, 385 N.E.2d 1196 (Ind. Ct. App. 1979) (as a part of property settlement, husband conveyed to children a remainder interest which was vested at the time but which was represented as an expectancy). *See In re Marriage of Hirsch*, 385 N.E.2d 193 (Ind. Ct. App. 1979) (husband's remainder interest in a trust held of no pecuniary value subject to distribution).

¹³⁶Cases basing marital property rights on social factors are, of course, irrelevant. *Cf. In re Marriage of McManama*, 386 N.E.2d 953 (Ind. Ct. App. 1979) (money expended for law school education of husband considered as marital property); *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978) (court could consider future earning potential of husband).

¹³⁷IND. R. TR. P. 59(G). *See Protective Ins. Co. v. Steuber*, 370 N.E.2d 406, 410-11 (Ind. Ct. App. 1977).

¹³⁸An appeal is initiated by filing a praecipe for the record within 30 days after the ruling on motion for a new trial. IND. R. APP. P. 2(A). The appeal then must be submitted by filing the record within 90 days from entry of the ruling on the motion to correct errors, whichever is later, or 30 days in the case of an interlocutory order. *Id.* 3(B).

from the time of the ruling on the motion for a new trial? In *Hudson v. Tyson*,¹³⁹ Judge Shields, in a scholarly opinion, allowed the appeal as timely by treating, in effect, the motion to correct error as an optional course which could be taken by the aggrieved party.¹⁴⁰ Her opinion points to a fact upon which scholars and lawyers are generally agreed—that in all cases the motion to correct error should be allowed only as an optional remedy preceding appeal—that is, optional with either of the parties, or the judge, on his motion. It should not be a condition to any appeal when the parties or the trial judge do not assert it. The case also held that a judgment against a garnishee was not an interlocutory order from which an appeal must be submitted within thirty days, but that an appeal perfected within the regular ninety-day period allowed from final judgments was proper.¹⁴¹ A dissent arguing for speedier appeals from these types of proceedings lost sight of the fact that the garnishee was seeking the appeal¹⁴² and that the imposition in this case of a \$6500 penalty for an error of judgment as to what constitutes an interlocutory order, upon which even judges cannot agree, is unduly severe.

The 1979 legislature amended the banker's adverse claim statute to protect a garnishee bank in the case of proceedings supplemental to execution.¹⁴³ Under this law, the judgment creditor shall provide the garnishee bank with notice of the proceedings, the unpaid amount of the judgment, and identifying information about the judgment defendant to enable the bank to verify him as its depositor.¹⁴⁴ The judgment creditor shall also serve the bank with an order issued by a court with jurisdiction.¹⁴⁵ Upon service, the bank "shall" restrict withdrawal of the amount then or thereafter on deposit, not exceeding the amount of the unpaid judgment, for sixty days

¹³⁹383 N.E.2d 66 (Ind. Ct. App. 1978). In this case judgment was entered Sept. 9, a motion to correct error was filed on Oct. 27 and overruled on Dec. 17, and the praecipe for the record was filed Dec. 17.

¹⁴⁰*Id.* at 71-72.

¹⁴¹*Id.* at 73. In this case, submission to the appellate tribunal was proper if within 90 days from the ruling on the motion to correct errors although not submitted within the 90 day period from the final judgment. If no optional motion to correct error is made, submission must be made within 90 days of judgment. *Id.* at 72.

¹⁴²The position of the garnishee in proceedings supplemental is quite different from that of the plaintiff and defendant in the principal action. The garnishee is entitled to a change of venue but other parties are not. *Compare* *State ex rel. Travelers Ins. Co. v. Madison Superior Court*, 265 Ind. 287, 354 N.E.2d 188 (1976), *with* *State v. Endsley*, 379 N.E.2d 440 (Ind. 1978). The garnishee may claim a right to trial by jury on his liability. *McCarthy v. McCarthy*, 156 Ind. App. 416, 297 N.E.2d 441 (1973). Hence, the judgment against him is final, if it is not continuing in nature.

¹⁴³IND. CODE § 28-1-20-1 (1976 & Supp. 1979).

¹⁴⁴*Id.* § 28-1-20-1(a) (Supp. 1979).

¹⁴⁵*Id.* § 28-1-20-1(a)(1) (1976 & Supp. 1979).

without liability to any person.¹⁴⁶ The statute applies to joint deposits but it makes no provision for notice to the joint owner who is not the judgment defendant.¹⁴⁷ If no further order is received from the court, the restriction on withdrawals shall be removed after sixty days.¹⁴⁸ The bank is thus freed of responsibility in honoring the rights of the depositor before notice and after the effective notice is terminated.

Under this new law, the judgment creditor with a motion for proceedings supplemental should request and procure an order from the court ordering the garnishee bank to answer and, when appropriate, to appear at the hearing or answer interrogatories. The proposed order should include the following: A notice that garnishment proceedings have been initiated in the court; the unpaid amount of the judgment; a description of the judgment defendant by correct name or names together with his residential and employment address, and any other information necessary to clarify the defendant's identity, such as marital partner, social security number and the like; and the garnishee's responsibilities under the law. The court should direct that the order be served with summons upon the garnishee bank and that the plaintiff serve a copy of the order and other papers upon the judgment defendant, if he can be found, or show the reason he is unable to do so.¹⁴⁹ This should be sufficient to meet the requirements of the statute. However, if it is determined that the account is joint, the plaintiff would be wise to make the joint owner a party and serve a copy of the order upon him with summons advising him of his rights.¹⁵⁰ If a final order is not to be forthcoming within sixty days, it seems that the court has inherent power upon request to continue the freeze for successive sixty-day

¹⁴⁶*Id.* § 28-1-20-1(a)(4) (Supp. 1979).

¹⁴⁷*Id.* § 28-1-20-1(a).

¹⁴⁸*Id.* § 28-1-20-1(a)(4).

¹⁴⁹The judgment debtor is not entitled to notice and hearing before issuance of the order. However, he is entitled to notice pursuant to Trial Rule 5 of the motion and order and other papers in the case. If the original judgment is entered after a default for failure to appear, he should be entitled to service of process along with the order and other papers in the case, although a decision of the court of appeals holds to the contrary. See generally Townsend, *Secured Transactions and Creditors' Rights, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 310, 331-33 (1976). For an excellent discussion of the entire problem, see Note, *Trial Rule 69(E): Proceedings Supplemental to Execution*, 11 IND. L. REV. 873 (1978).

¹⁵⁰*Cf.* Field v. Malone, 102 Ind. 251, 1 N.E. 507 (1885) (attachment); First Nat'l Bank v. Croman, 288 Mich. 370, 284 N.W. 912 (1939) (proceedings to reach joint safe deposit box); Hanebrink v. Tower Grove Bank & Trust Co., 321 S.W.2d 524 (Mo. App. 1959) (joint savings account). Although the new statute protects the garnishee bank in case of a joint account, the statute does not protect a joint owner who is not named as a party. IND. CODE § 32-4-1.5-12 (1976) (last sentence).

periods until the rights of the parties are determined by a final judgment in the proceedings.

Effective September 1, 1979, an employer required to make deductions from disposable earnings of an employee for a judgment debt may deduct a fee measured by the greater of eight dollars or two percent of the deduction, one-half to be deducted from the payment to the creditor and the other half from the payment to the employee.¹⁵¹ The fee may be collected only once for the judgment debt, but it may be equally apportioned over the pay periods.¹⁵²

7. *Enforcement of Divorce and Support Decrees.*—It now seems to be settled that overdue installments under a support order or property settlement decree may be enforced by execution or proceedings supplemental as other judgments are enforced, without prior judicial proceedings, and that the ten-year statute of limitations runs on each installment as it becomes due. In clarifying these principles, the court in *Kuhn v. Kuhn*¹⁵³ recognized that enforcement of support orders by way of contempt must be preceded by notice and hearing.¹⁵⁴ Fears expressed in prior decisions that without judicial proceedings a spouse might be subjected to excessive execution were found to be mythical in view of available remedies. Indiana procedure allows the injured party to seek a stay of enforcement by motion.¹⁵⁵ The court in *In re Marriage of Honkomp*,¹⁵⁶ however, erroneously denied the husband the right to setoff against overdue child support payments an obligation of the wife to the husband.¹⁵⁷ A foreign support order may be enforced under the Uniform Reciprocal Enforcement of Support Act¹⁵⁸ by informal procedures analogous to proceedings supplemental, and when confirmed, the foreign order becomes, in effect, an Indiana decree.¹⁵⁹ Inasmuch as a

¹⁵¹IND. CODE § 24-4.5-5-105(4) (Supp. 1979).

¹⁵²*Id.* If apportioned, no fee may be less than one dollar except during the final pay period. *Id.*

¹⁵³389 N.E.2d 319 (Ind. Ct. App. 1979). For the unsatisfactory state of the prior Indiana law on the subject, see Townsend, *supra* note 80, at 281-85.

¹⁵⁴389 N.E.2d at 321.

¹⁵⁵"Satisfaction of a judgment or credits thereon may be ordered, for sufficient cause, upon notice and motion." IND. R. TR. P. 13(M).

¹⁵⁶381 N.E.2d 881 (Ind. Ct. App. 1978).

¹⁵⁷*Id.* at 882.

¹⁵⁸IND. CODE §§ 31-2-1-1 to -39 (1976 & Supp. 1979).

¹⁵⁹Prior case law held that when suit was brought upon a foreign support order, the Indiana order merged only the delinquent installments. Hence, upon future defaults, suit was brought again upon the foreign decree. *McCarthy v. McCarthy*, 159 Ind. App. 540, 308 N.E.2d 429 (1974). The Uniform Act, in effect, makes the foreign decree an Indiana decree for past as well as future defaults. But the original decree remains enforceable in the state of origin, subject to credits for payments made under the Indiana decree. *Banton v. Mathers*, 159 Ind. App. 634, 309 N.E.2d 167 (1974) (modification of order in foreign state not binding on originating state).

change of venue is not permitted from proceedings supplemental and enforcement of support orders,¹⁶⁰ the court denied a change sought by the delinquent in a suit to enforce a Pennsylvania support order.¹⁶¹

8. *Attachment*.—Prior to the now famous case of *Shaffer v. Heitner*,¹⁶² an Indiana court could exercise jurisdiction over a nonresident by attaching or garnishing property within the state. Subject to a requirement of reasonable notice, the court was then empowered to enter judgment limited to the extent of the value of property within the state.¹⁶³ Under *Shaffer*, however, the plaintiff must either obtain personal jurisdiction over the defendant by service or appearance in Indiana, or show that the claim arose out of sufficient contacts with Indiana to justify jurisdiction under *International Shoe Co. v. Washington*,¹⁶⁴ or the plaintiff's cause of action must have been reduced to judgment in a jurisdiction in which these requirements were met. This last exception was recognized in *Hexter v. Hexter*,¹⁶⁵ in which the plaintiff sought enforcement of a foreign judgment for arrearages of support by subjecting the defendant's interest in an Indiana estate to payment of the judgment. The court noted that Indiana had in rem jurisdiction to award relief to the extent of the Indiana property without meeting the contacts requirement, and without personal service or appearance in Indiana.¹⁶⁶

9. *Receivership*.—It is well established that a general creditor cannot obtain a receiver over the assets of an individual and that the courts lack jurisdiction for this purpose. The appointment of a receiver may be challenged by writ of mandate and prohibition.¹⁶⁷ Whether this rule applies to a partnership creditor seeking a receivership over partnership assets is not clear.¹⁶⁸ In *State ex rel. Petty v. Superior Court*,¹⁶⁹ the court held that when a receiver had been appointed over the assets of a partnership at the instance of a

¹⁶⁰IND. CODE § 31-1-2-37 (1976).

¹⁶¹*State ex rel. Greebel v. Endsley*, 379 N.E.2d 440 (Ind. 1978).

¹⁶²433 U.S. 186 (1977), discussed in Townsend, *supra* note 80, at 275-76.

¹⁶³*Transcontinental Credit Corp. v. Simkin*, 150 Ind. App. 666, 277 N.E.2d 374 (1972).

¹⁶⁴326 U.S. 310 (1945). For a decision recognizing that Indiana residency gave the court jurisdiction for divorce, but that other contacts in the state were insufficient to adjudicate property rights, see *In re Marriage of Rinderknecht*, 367 N.E.2d 1128 (Ind. Ct. App. 1977).

¹⁶⁵386 N.E.2d 1006 (Ind. Ct. App. 1979).

¹⁶⁶*Id.* at 1007. The court also found that an appearance by defendant's counsel corrected any deficiency in service of process. *Id.* at 1009.

¹⁶⁷*State ex rel. Makar v. St. Joseph County Circuit Court*, 242 Ind. 339, 179 N.E.2d 285 (1962).

¹⁶⁸*Zechiel v. Firemen's Fund Ins. Co.*, 61 F.2d 27 (7th Cir. 1932) (indicating court had jurisdiction to appoint a receiver over partnership at instance of creditor).

¹⁶⁹378 N.E.2d 822 (Ind. 1978).

creditor and the assets sold, objections by the partners must be raised by an appeal.¹⁷⁰

A mind-boggling new statute governing liquidation and rehabilitation of insurance companies was adopted by the 1979 legislature.¹⁷¹ The law includes comprehensive provisions which parallel in many respects the federal bankruptcy law prior to 1979, an indication that insurance liquidations belong in bankruptcy where they are presently excluded.

10. *Creditors' Rights in Decedents' Estates.*—When specific property upon which there is a lien is devised, the devisee takes the property subject to the lien, in the absence of other provisions.¹⁷² But when property on which there is a lien passes to a surviving tenant by the entirety, joint tenant,¹⁷³ or to a survivor by force of contract,¹⁷⁴ it is less clear whether the survivor takes subject to the lien. In the case of entireties property, the survivor may recover contribution when the parties are jointly liable upon a lien or mortgage for which the property is security.¹⁷⁵ *In re Estate of Smith*¹⁷⁶ dealt with an unusual aspect of this problem. *H* executed a mortgage and note in favor of *E* on Tract *A*, and secured the obligation by pledging rents from Tract *B*. *H* later conveyed Tract *A* to *H* and *W* as tenants by the entireties. On the death of *H*, the court held that *W* could force the representative to apply the rents from Tract *B* towards payment of the mortgage.¹⁷⁷ In other words, a person tak-

¹⁷⁰*Id.* at 823. The time for taking an appeal is within 10 days from appointment. IND. CODE § 34-1-12-10 (1976).

¹⁷¹IND. CODE §§ 27-9-1-1 to -6 (Supp. 1979).

¹⁷²*Id.* § 29-1-17-9 (1976).

¹⁷³*In re Estate of Linker*, 30 Colo. App. 25, 488 P.2d 1128 (1971) (surviving joint tenant entitled to contribution); *contra*, *Ratte v. Ratte*, 260 Mass. 165, 156 N.E. 870 (1927) (surviving joint tenant not entitled to contribution).

¹⁷⁴That the surviving beneficiary of a pledged life insurance policy may pay the pledgee and claim subrogation to the rights of the creditor against the estate of the insured, *see Walzer v. Walzer*, 3 N.Y.2d 8, 143 N.E.2d 361 (1957).

¹⁷⁵*Keil v. Keil*, 51 Del. 351, 145 A.2d 563 (1958); *McLochlin v. Miller*, 139 Ind. App. 443, 217 N.E.2d 50 (1966) (survivor entitled to exoneration from estate of decedent to extent to one-half of lien); *Magenheimer v. Councilman*, 76 Ind. App. 583, 125 N.E. 77 (1919) (survivor paying lien indebtedness recovered contribution from estate of decedent).

¹⁷⁶388 N.E.2d 287 (Ind. Ct. App. 1979).

¹⁷⁷*Id.* at 290. A related situation is found in *First Nat'l City Bank v. Phoenix Mut. Life Ins. Co.*, 364 F. Supp. 390 (S.D.N.Y. 1973), in which *H* assigned insurance policies and *H* and *W*, as tenants by the entireties, executed a mortgage on a house to *E* Bank as security for a loan. The insurance exceeded the amount of the loan. After *H*'s death, the United States sought to enforce a tax lien filed before *H* died and to compel *E* Bank, under a theory of marshaling, to satisfy its lien out of the entireties property so that the federal tax lien could be paid from the insurance proceeds. Marshaling was denied and the wife's right to have the bank loan paid from the insurance was affirmed. *Id.* at 392-93.

ing by nontestamentary survivorship may force the representative to apply other assets to pay a lien on the property when the obligation is that of the deceased and not that of the survivor. On a theory of subrogation or exoneration, the nontestamentary survivor thus becomes a creditor of the decedent's estate to the extent of the latter's obligation or duty of contribution. The case stands for three propositions. One is that the survivor may force the decedent's estate to pay the latter's share of the obligations secured by the survivorship property from other assets of the estate. Another is that if the decedent is primarily liable upon the debt, the survivor may require the decedent's estate to satisfy the whole debt. The third proposition is that by application of the principle of marshaling, the survivor may require that other collateral be exhausted first when the decedent's obligation or share of the obligation is secured by collateral in addition to the survivorship property. Although the case is limited to the husband and wife relationship and entireties survivorship rights, no convincing reason appears why it should not extend to other parties and other survivorship rights.¹⁷⁸

11. *Bankruptcy*.—In a bankruptcy, real property is taken by the trustee subject to a mortgage. Rents of a substantial amount are collected by the trustee. Is the mortgagee entitled to the rents? In *Butner v. United States*,¹⁷⁹ the Court held that the right to rents accruing during bankruptcy proceedings is determined by state law.¹⁸⁰ Upon this point, Indiana law is not clear, but it seems that if the mortgage specifically covers rents which accrue upon default, an Indiana mortgagee would be able to claim the rents as against the trustee.¹⁸¹ The effect of the decision seemingly will not be changed by the Bankruptcy Reform Act of 1978.¹⁸²

¹⁷⁸For a similar problem recently arising in bankruptcy, see *In re Jack Green's Fashions for Men—Big and Tall, Inc.*, 597 F.2d 130 (8th Cir. 1979). *D* corporation, which was indebted to *E*, executed a security interest on corporate property. *H*, a principal stockholder, and his wife *W* also secured the debt by a mortgage on entireties property. The court held that, on bankruptcy of *D*, the trustee, under principles of marshaling, could compel *E* to exhaust the security in entireties property before asserting its right to the corporate security. The court overlooked the right of *W*, and possibly *H* as well, to exoneration or marshaling for the purpose of compelling *E* first to satisfy its claim from the principal obligor, *D* corporation.

¹⁷⁹99 S. Ct. 914 (1979) (court applied North Carolina law).

¹⁸⁰*Id.* at 919.

¹⁸¹*Hemstock v. Wood*, 113 Ind. App. 112, 44 N.E.2d 1016 (1942); *Cline v. Massey*, 92 Ind. App. 605, 169 N.E. 882 (1930).

¹⁸²Pub. L. No. 95-598, §§ 101-411, 92 Stat. 2549 (1978) (codified at 11 U.S.C. §§ 101-151326). Rents from estate property pass to the estate in bankruptcy. 11 U.S.C. § 541(a)(6). If a valid security interest in property covers rents or profits, the latter arising after the commencement of the case will be included in the security in accordance with nonbankruptcy law "except to the extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise." *Id.* § 552(b).

Some claims will not be discharged in bankruptcy. Examples are those based upon misrepresentation, false pretenses, or malicious acts.¹⁸³ If the claim is reduced to judgment before bankruptcy, the creditor in proceedings opposing discharge of the judgment may bring in evidence to establish that the underlying claim is based upon these kinds of wrongdoing making the judgment non-dischargeable. These principles were recognized and applied by the United States Supreme Court in *Brown v. Felsen*,¹⁸⁴ in which the creditor had introduced the issue of fraud and misrepresentation in the state action upon the debtor's guaranty leading to stipulations and a judgment without indication that liability was based upon the fraud. The creditor was allowed again to assert the misrepresentation as a basis for challenging dischargeability of his judgment. The court determined that the policy of the bankruptcy act requiring or permitting questions of dischargeability to be settled by proceedings in bankruptcy negated application of principles of res judicata in bankruptcy insofar as the same issues might have been litigated in the state action leading to the judgment. Whether a pre-bankruptcy judgment actually litigating and affirmatively deciding the same issues involved in determining dischargeability would bar the creditor or debtor in bankruptcy on principles of estoppel was left open by the decision.¹⁸⁵

12. *Suretyship; Construction Contracts.*—Three important decisions dealt with security devices as they concern construction contracts. One involved the general rule of suretyship discharging a surety when the creditor materially breaches his obligation towards the principal, particularly when the breach enhances the risks assumed by the surety.¹⁸⁶ The court in *Culligan Corp. v. Trans-america Insurance Co.*¹⁸⁷ held that the rule did not apply to release

¹⁸³Section 17 of the old Bankruptcy Act and § 523(a) of the Bankruptcy Code of 1978 set forth the particular claims which are not discharged in bankruptcy. Compare 11 U.S.C. § 35 (repealed 1978), with *id.* § 523(a) (1978). The creditor is required to apply to the bankruptcy court for a determination of non-dischargeability only with respect to grounds based upon intentional wrongs under both laws, but with respect to other grounds jurisdiction of the bankruptcy court to determine dischargeability is left optional with either the debtor or creditor. *Id.* § 35(b)(2) (repealed 1978); 11 U.S.C. § 532 (c) (1978); Bankruptcy Rule 409(a), (b).

¹⁸⁴99 S. Ct. 2205 (1979).

¹⁸⁵The issue of estoppel by judgment was left hanging by an inconclusive footnote citing opposing authorities. 99 S. Ct. at 2213 n.10.

¹⁸⁶When the breach by the creditor is material and the principal elects to rescind, the surety cannot be held upon his promise. *Board of Comm'rs v. Hill*, 115 Ind. 316, 327-31, 16 N.E. 156, 161-62 (1888) (owner failed to pay contractor who quit construction—surety released). If, however, a breach by the creditor is immaterial or treated as immaterial, the surety is limited to setoff when permitted. *Walcutt v. Clevite Corp.*, 13 N.Y.2d 48, 191 N.E.2d 894 (1963). Cf. IND. R. TR. P. 13(K)(3)(b) (surety may assert as a counterclaim "any claim owned by the person against whom he has recourse").

¹⁸⁷580 F.2d 251 (7th Cir. 1978).

the surety on its payment bond running to third-party, subcontractor beneficiaries when the owner was in default to the principal contractor.¹⁸⁸ In this case the owner, whose contract called for the surety bond, failed to pay for work owing to the prime contractor, who defaulted. As a consequence, a subcontractor was also unpaid by the prime. The surety's defense, that the owner-promisee defaulted and thereby caused the loss, was rejected by the court on the ground that the promise of the surety to pay suppliers and subcontractors is independent, and not conditioned upon performance by the owner-promisee.¹⁸⁹ The court recognized that the necessary prompt payment to subcontractors on construction projects is placed in peril when retainages are wrongfully withheld from the prime contractor in the payment cycle.¹⁹⁰

In *Clow Corp. v. Ross Township School Corp.*,¹⁹¹ a subcontractor became indebted to a supplier of materials on several construction projects, one of which was covered by a surety payment bond. A partial payment made to the supplier was apportioned among the debts incurred in all the projects. When the subcontractor became insolvent, the supplier sued the surety, who claimed that the portion of the payment traced to the project upon which it was surety must be applied on the obligation owing by the subcontractor for work furnished on that project. The court recognized that although Indiana case law did not require a supplier to apply construction funds upon an indebtedness arising therefrom,¹⁹² Illinois law was to the

¹⁸⁸*Id.* at 253. It seems that the surety who is compelled to pay the subcontractor-beneficiaries may recover from the creditor-owner who improperly fails to withhold funds. *See* Fort Worth Independ. School Dist. v. Aetna Cas. & Sur. Co., 48 F.2d 1 (5th Cir. 1931); National Sur. Co. v. County Bd. of Educ., 15 F.2d 993 (4th Cir. 1926) (the creditor-owner wrongfully paid retainages to principal contractor who squandered funds). *Cf.* Alvord & Swift v. Stewart M. Muller Constr. Co., Inc., 46 N.Y.2d 276, 385 N.E.2d 1238 (1978) (subcontractor may also recover from the owner if his breach knowingly interferes with the prime contractor's performance to the subcontractor).

¹⁸⁹580 F.2d at 254. *See* Glades County v. Detroit Fidelity & Sur. Co., 57 F.2d 449, 451 (5th Cir. 1932). Indiana cases cited by the court involved a failure of the creditor-owner to retain funds as required by the contract. *E.g.*, Equitable Sur. Co. v. United States, 234 U.S. 448 (1914); Connecticut v. State *ex rel.* Stutsman, 125 Ind. 514, 25 N.E. 443 (1890); United States Fidelity & Guar. Co. v. American Blower Co., 41 Ind. App. 620, 84 N.E. 555 (1908) (agreement altering the duty of performance as between the principal contractor and the owner will not discharge subcontractor-beneficiaries or release the surety).

¹⁹⁰580 F.2d at 254. In support of its opinion, the court cited with approval, *Midland Eng'r Co. v. John A. Hall Constr. Co.*, 398 F. Supp. 981 (N.D. Ind. 1975) (requiring payment of retainage to subcontractors within a reasonable time, even though such payment was conditioned upon payment of retainage by the owner to the prime contractor).

¹⁹¹384 N.E.2d 1077 (Ind. Ct. App. 1979).

¹⁹²*Id.* at 1081. *See* Western & S. Indem. Co. v. Cramer, 104 Ind. App. 219, 10 N.E.2d 440 (1937). When a prime contractor is indebted to a subcontractor on several

contrary.¹⁹³ Because the prime contractor, the subcontractor, and the supplier were all from Illinois, the contracts were executed there, and payments and deposits were made in that state, the law of Illinois controlled even though the contract had been performed in Indiana for an Indiana school authority.¹⁹⁴

As a general rule, a debtor bound on several obligations to a creditor may designate how a partial payment made by him shall be applied; if he does not do so, the creditor may make the choice; and if neither makes the application, the law will do it, usually to the least secured.¹⁹⁵ The owner or surety upon a construction contract may protect himself by specifying that payments made under the contract must be applied to contract obligations.¹⁹⁶ Statutes in some states have impressed such payments as a trust fund to be so applied.¹⁹⁷ Whether it is within the fair expectation of the parties to a construction project that funds paid down the line to contractors and subcontractors must be held in trust and applied towards unpaid suppliers may rest in custom and usage in the trade, and this may not be sufficiently certain to justify a rule of law.¹⁹⁸

projects and makes payment from funds received from the owner upon one of them, neither he nor the subcontractor has a duty to apply the funds to the obligation incurred on that project, even though it enables the subcontractor to claim a mechanic's lien upon the property. *Shea v. Peoples Coal & Cement Co.*, 93 Ind. App. 302, 161 N.E. 849 (1931). By statute a contractor or subcontractor who accepts payment and who is indebted to his suppliers on the project is guilty of a Class D felony if he fails to notify his creditor, and the creditor suffers loss as a consequence. IND. CODE § 32-8-3-15 (Supp. 1979). It has not yet been determined whether this will impose a trust upon payments made.

¹⁹³384 N.E.2d at 1081 (following *Alexander Lumber Co. v. Aetna Acc. & Liab. Co.*, 296 Ill. 500, 129 N.E. 871 (1921)). The traditional view is that payments made from the construction project or traced to it need not be applied towards construction debts incurred in favor of suppliers. *Standard Oil Co. v. Day*, 161 Minn. 281, 201 N.W. 410 (1924). Many cases impose an obligation upon the supplier to apply payments traced to the project if the supplier knows or has reason to know where the payment came from. *United States v. Roelof Constr. Co.*, 418 F.2d 1328 (9th Cir. 1969); *United States v. Wibco, Inc.*, 396 F. Supp. 1253 (1975).

¹⁹⁴384 N.E.2d at 1082. The court applied the conflicts of law rule in *Barber v. Hughes*, 223 Ind. 570, 63 N.E.2d 417 (1945).

¹⁹⁵*See generally* *Mid-Continent Supply Co. v. Atkins & Potter Drill. Corp.*, 229 F.2d 68 (10th Cir. 1956).

¹⁹⁶A duty or trust could be established by a contract provision or by check payable to the contractor and the supplier. If the supplier being paid has knowledge or constructive knowledge of the source of payment and the restriction upon it, he must apply the payment to the construction project. *See United States ex rel. Carroll v. Beck*, 151 F.2d 964 (6th Cir. 1945); *State ex rel. Palmer Supply Co. v. Walsh & Co.*, 575 P.2d 1213 (Alaska 1978).

¹⁹⁷*See, e.g., In re Ketchum*, 409 F. Supp. 743 (S.D.N.Y. 1975) (contractor violating statute denied discharge in bankruptcy).

¹⁹⁸*Cf. Chicago Bridge & Iron Co. v. Reliance Ins. Co.*, 46 Ill. 2d 522, 264 N.E.2d 134 (1970) (holding that a surety would not be released when partial lien waivers showing

Ideal Heating Co. v. Falls & Noonan, Inc.,¹⁹⁹ held that a subcontractor upon a public construction project could recover from the surety and from the retainage held as against the prime contractor, on the basis of his contract price.²⁰⁰ Unlike his counterpart claiming a mechanic's lien, who must prove the reasonable value of his performance, the subcontractor may recover for his work at the contract rate.²⁰¹

13. *Miscellaneous.*—The fixing of attorney's fees when provided by contract or statute occupied no little time of the courts during the last year. Case law established that although requested findings of fact upon the amount of the fees are not required,²⁰² an award based upon illegal bar association schedules, which had been admitted into evidence, was proper;²⁰³ the expertise of the trial judge justifies an award by him without proof as to the value of attorney's fees;²⁰⁴ proof establishing a reasonable contingent fee supported a noncontingent promise to pay attorney's fees;²⁰⁵ and such fees must be tendered when incurred, even though suit has not been commenced.²⁰⁶

The procedures for foreclosure of one type of artisan lien on motor vehicles was clarified by current legislation providing notice to owners and other lienholders of record, and facilitating a transfer of the title certificate to the purchaser.²⁰⁷

payment were taken by the contractor from suppliers, upon proof that the lien waivers were taken as a matter of custom and usage before payment). If usage establishes that contract funds are used for payment of nonproject obligation of suppliers, a trust without further agreement would seem unlikely.

¹⁹⁹378 N.E.2d 946 (Ind. Ct. App. 1978).

²⁰⁰*Id.* at 948.

²⁰¹*Id.*

²⁰²*Greiner v. Greiner*, 384 N.E.2d 1055, 1057 (Ind. Ct. App. 1979) (divorce case).

²⁰³*Id.* at 1058.

²⁰⁴*Fox v. Galvin*, 381 N.E.2d 103, 108 (Ind. Ct. App. 1978) (\$2,000 awarded on \$6,500 mechanic's lien in exhaustive opinion).

²⁰⁵*Streets v. M.G.I.C. Mortgage Corp.*, 378 N.E.2d 915, 920-21 (Ind. Ct. App. 1978). In this case the court also misapplied requirements of the U.C.C.C. with respect to attorney's fees. See notes 18, & 30-31 *supra* and accompanying text.

²⁰⁶*Motor Dispatch, Inc. v. Buggie*, 379 N.E.2d 543, 546 (Ind. Ct. App. 1978).

²⁰⁷IND. CODE § 9-9-5-6 (Supp. 1979).

XVI. Torts

Gary A. Ratner*

In *Foster v. Percy*,¹ the Indiana Supreme Court created an absolute privilege reaching the defamatory statements of a local deputy prosecutor made to a reporter shortly after indictment of the eventual plaintiff. The indictment proved defective and a subsequent attempt to indict the plaintiff failed. The defamatory remarks alleged various details of the plaintiff's heroin operations indicating, *inter alia*, his gross income and his membership in a nationwide drug ring. In a civil suit for defamation filed against the deputy prosecutor and the county prosecutor, the trial court granted a motion to dismiss for failure to state a cause of action.² On appeal, the First District of the Indiana Court of Appeals reversed the trial court in a unanimous decision.³ On transfer, the judgment of the trial court was unanimously reinstated, the supreme court having concluded that "since it is a prosecutor's duty to inform the public as to his investigative, administrative and prosecutorial activities, the prosecutor must be afforded an absolute immunity in carrying out those duties."⁴

Prosecutors have long enjoyed several immunities in conjunction with their function in the judicial process. Most significant among these is the immunity from suit for malicious prosecution, which originated in the United States with an Indiana case, *Griffith v. Slinkard*.⁵ In *Imbler v. Pachtman*,⁶ the United States Supreme Court

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¹387 N.E.2d 446 (Ind. 1979).

²*Id.* at 447. Actually, the only issue on appeal was the dismissal of the cause of action against the county prosecutor. The opinion throughout treats the county prosecutor and deputy alike, except insofar as the deputy has not been delegated, presumably by the county prosecutor, the authority to give information to the public. See *id.* at 449.

³*Foster v. Percy*, 376 N.E.2d 1205, 1211 (Ind. Ct. App. 1978).

⁴387 N.E.2d at 449. The use of the plural here suggests that the immunity granted in this case extends to all duties of the prosecutor; the choice seems deliberate. Although the sentence might be read as implying that other duties are immunized because the prosecutor has a duty to inform the public, a better understanding would be that, given the immunization of the public information function, *a fortiori*, more important functions such as investigation and administration are immunized. Much of what is said in this review of the case relates equally well to all extrajudicial duties of the office. The specific focus of this article is, however, the decision in *Foster v. Percy*, and not the question of prosecutorial immunity in general.

⁵146 Ind. 117, 44 N.E. 1001 (1896).

⁶424 U.S. 409 (1976).

extended common law prosecutorial immunity to actions arising under section 1983 of the United States Code⁷ in cases involving the initiation of a prosecution or presentation of a case. Chief Justice Givan, writing for the Indiana Supreme Court in *Foster*, purported to extend the reasoning of *Griffith* and *Imbler* to protect a prosecutor acting in fulfillment of his "duty to inform the public regarding cases which are pending his office"⁸ from a suit in defamation.

Viewed as a mere defamation case, the result in *Foster* is extraordinary. In this area of the common law, absolute privilege is held by all participants in a judicial proceeding, including attorneys for both sides, witnesses, jurors and judge.⁹ In the case of attorneys, the *Restatement* formulation of this rule is an extremely broad one, reaching "communications preliminary to a proposed judicial proceeding . . . if . . . [the defamatory statement] has some relation to the proceeding."¹⁰ Nonetheless, *Johnston v. Cartwright*¹¹ appears to be the only case in which that privilege was found to embrace attorney remarks to a reporter. That case involved a defendant-attorney's statement that his client's defamatory remarks "came to us on pretty good authority."¹² This presumed defamation, however, was issued at a time when the client's original statements had already received wide publicity and had been publicly met by an accusation of falsity and libel and a challenge to prove. Then-Circuit Judge Blackmun found that "[a]ll signs pointed to incipient litigation and to the necessity for protective action."¹³ This indication that the court believed that a "trial by press" was already well underway suggests that its decision to recognize an attorney's absolute privilege in the case should be taken as a product of those rather special circumstances. For it is precisely the fear of trial by press that lies at the root of a widely accepted rule limiting the attorney's absolute privilege to statements made in the course of his functions within the judicial process, the rule to which the Indiana Supreme Court has now fashioned a second exception.

The late Dean Prosser stated the rule flatly: "It is clear, however, that statements given to the newspapers concerning the case are no part of the judicial proceeding, and are not absolutely privileged."¹⁴ The leading case of *Kennedy v. Cannon*¹⁵ is illustrative of

⁷42 U.S.C. § 1983 (1976).

⁸387 N.E.2d at 448.

⁹See generally L. ELDRIDGE, THE LAW OF DEFAMATION 340-74 (1978).

¹⁰RESTATEMENT (SECOND) OF TORTS § 586 (1977).

¹¹355 F.2d 32 (8th Cir. 1966).

¹²*Id.* at 34.

¹³*Id.* at 37 (emphasis added).

¹⁴W. PROSSER, LAW OF TORTS § 114, at 781 (4th ed. 1971).

¹⁵229 Md. 92, 182 A.2d 54 (1962).

both the stringency with which the rule is applied and the reasons therefor. In that case, the defendant-attorney Kennedy was representing a black man arrested for the rape of the white plaintiff. All relevant events occurred in Salisbury, Maryland. Kennedy learned that the local newspaper was about to publish a story which stated that the accused had signed a statement admitting intercourse. Recalling that twenty-five years earlier a similar situation in Salisbury had resulted in a lynching, Kennedy told the reporter working on the story of his client's claim that the woman had consented. The court denied Kennedy's alternative claims for absolute or *qualified* privilege, saying in part:

The solicitude of . . . [the attorney] for his client is understandable, and the initial act of the State's Attorney in releasing his statement to the press must be disapproved. Nevertheless . . . [his] legal duty in no way justified the publication of his defamatory reply statement. To hold otherwise would open the door to the universally condemned "trial by press," a procedure forbidden to counsel and subversive of the fair and orderly conduct of judicial proceedings.¹⁶

The judicial proceedings privilege in defamation thus limited by *Kennedy* is itself founded on the idea of protecting the judicial process, reflecting the belief that the full disclosure of any and all pertinent evidence within the judicial process will aid the search for truth. As Justice White put the matter in his concurring opinion in *Imbler*:

The reasons for this rule are substantial. It is precisely the function of a judicial proceeding to determine where the truth lies. The ability of courts, under carefully developed procedures, to separate truth from falsity, and the importance of accurately resolving factual disputes in criminal (and civil) cases are such that those involved in judicial proceedings should be "given every encouragement to make a full disclosure of all pertinent information within their knowledge." . . . For a lawyer, it means that he must be permitted to call witnesses without fear of being sued if the witness is disbelieved and it is alleged that the lawyer knew or should have known that the witness' [sic] testimony was false. . . . [I]f the risk of having to defend a civil damage suit is added to . . . criminal laws against . . . subornation of perjury, the risk of self-censorship becomes too great.¹⁷

¹⁶*Id.* at 101, 182 A.2d at 59.

¹⁷424 U.S. at 439-40 (quoting in part 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 5.22, at 424 (1956)).

And if trial by press is subversive of that same process, it can hardly be contended that the privilege thus accorded can sensibly be extended to cover remarks made to the press. Such an extension would cut the ground from under itself; the reasoning of such an extension could only be called reasoning in a very vicious circle.

Although the *Foster* case arose under the law of defamation, the Indiana Supreme Court paid scant attention to defamation law and its lessons in Chief Justice Givan's opinion, which makes no mention of "trial-by-press," *Kennedy*, or even Dean Prosser.¹⁸ Instead, *Foster* claimed to rely on an extension of the reasoning of the *Griffith* and *Imbler* cases to reach the extrajudicial prosecutorial duty of informing the public, and *a fortiori*, more significant investigative and administrative duties.¹⁹ Even a casual reading of those two cases would, however, warrant great caution in attempting such an extension. *Griffith*, which provided immunity for prosecutors from malicious prosecution, rested heavily on the judicial nature of that prosecutorial function. At the crucial point in its analysis the Court quoted from a section on the privilege of judges in judicial proceedings from a treatise on the law of defamation,²⁰ thus suggesting that any privilege was necessary to and limited by the exigencies of the judicial process. Likewise, although the opinion of Justice Powell in *Imbler* declined to consider whether the immunity from suit under section 1983 granted in that case might extend to prosecutorial administrative or investigative responsibilities,²¹ it was noted both that the basis of prosecutorial immunity lay on the same foundation as that of judges and grand jurors²² and that the questioned activities of the defendant in *Imbler* were "intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force."²³ When read, not casually, but in the total context of *Imbler*, these statements do considerably more than suggest the need for caution in applying the result, supplying a limitation which has been acknowledged by other courts considering proposed extensions of prosecutorial immunity.²⁴

Prior to the decision in *Imbler*, prosecutors had consistently lost attempts to have their immunity from suit under section 1983 ex-

¹⁸The opinion of the court of appeals referred to both the case and the dean. 376 N.E.2d at 1208. The opinion of Judge Robertson did not, however, mention trial by press or attempt to examine the policy reasons involved in the case.

¹⁹See note 4 *supra*.

²⁰146 Ind. at 121-22, 44 N.E. at 1002 (citing J. TOWNSHEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL § 227, at 395-96 (3d ed. 1877)).

²¹424 U.S. 430-31.

²²*Id.* at 422-23.

²³*Id.* at 430.

²⁴See notes 27-44 *infra* and accompanying text.

tended to activities beyond the initiation or presentation of a case, with at least four of the United States Circuit Courts of Appeal holding squarely against such extensions.²⁵ In post-*Imbler* section 1983 litigation, they seem to have fared no better²⁶ with the rather revealing exception of the decision in *Forsyth v. Kleindeinst*,²⁷ a case which arose from the decision of former United States Attorney General John Mitchell to authorize warrantless electronic surveillance.

In that case, decided several months after *Foster*, the Third Circuit Court of Appeals recognized that the securing of additional information may be necessary upon occasion for an informed decision to prosecute. The court indicated its belief that the right to make an unfettered decision to prosecute must, therefore, include a limited right to gather facts necessary to form that decision.²⁸ At the same time, the court recognized the evident potential for expansion of this exception to include all of a prosecutor's investigative activity. It therefore carefully confined the extension of *Imbler* protection to an act designed to secure information necessary to a decision to initiate prosecution, clearly indicating that "when the decision arises in the context of a purely investigative or administrative function, the decision will not be protected by absolute immunity."²⁹ Although the court was fully aware that the value of an absolute immunity is to avoid the chilling effect of later second-guessing by factfinders in the courts,³⁰ the court remanded the case for development of facts from which Mitchell's role, quasi-judicial or investigative/administra-

²⁵*Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974); *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974); *Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965).

²⁶*See Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977); *Walker v. Cahalan*, 542 F.2d 681 (6th Cir. 1976).

²⁷599 F.2d 1203 (3rd Cir. 1979).

²⁸*Id.* at 1215.

²⁹*Id.*

³⁰One important difference between absolute and qualified immunity is that the existence of absolute immunity will lead to disposition of the case without, in most instances, trial on issues of fact such as "good faith" or "reckless disregard of truth or falsity." The beneficiary of an absolute immunity will rarely be sued; if he is, the case can usually be disposed of on the pleadings. By remanding *Forsyth*, the Third Circuit placed the defendant, Mitchell, at risk of finding in fact that he was engaged in purely investigative activity. The danger of "dilution" of the immunity arises because future prosecutors who need information to make the decision on initiation of a prosecution might so fear the inconvenience of facing trial on an ambiguous issue of fact that they will skew their decisions toward the side of personal safety. Still, even an absolute immunity like that of *Barr v. Mateo*, 360 U.S. 564 (1959), must occasionally present questions of fact; no immunity will cover all possible activities of its beneficiary. In other words, even absolute immunities are susceptible to abuse. *See generally* L. ELDRIDGE, *supra* note 9, at 414-16.

tive, could be determined.³¹ That it was content to do so, although explicitly recognizing that such an action "might dilute" the absolute immunity thus extended,³² serves to demonstrate the court's determination that *Imbler* be limited to quasi-judicial activities.

The reluctance of the Third Circuit to extend *Imbler* beyond those cases having a close relationship to the judicial aspects of the prosecutorial function was underscored by its treatment of two of its own prior cases. One of these involved alleged prosecutorial conduct all but indistinguishable from that now immunized in Indiana by *Foster*. In *Helstoski v. Goldstein*,³³ then-former Congressman Helstoski brought an action against a United States Attorney for, *inter alia*, deliberate leaks to the press of false information. The district court had dismissed the action on the basis of *Imbler*. The Third Circuit reinstated the suit, noting that even if *Imbler*-immunity extended to the administrative and investigative functions, deliberate leaks to the press of false information were outside the scope of immunity.³⁴ The *Forsyth* court relied on *Helstoski* as the authority for its holding that "where the activities of the Attorney General depart from those which cast him in his quasi-judicial role, the protection of absolute immunity will not be available."³⁵

If the *Forsyth* court's treatment of *Helstoski* shows its outright rejection of an extension of immunity to cases with a close family resemblance to *Foster*, similar treatment of another case serves to demonstrate just how extreme is the overextension of *Imbler* by the Indiana court. The defendant Mitchell confronted the court with its own earlier rejection of an advocacy/investigative distinction in *Cambist Films, Inc. v. Duggan*,³⁶ a case in which a prosecutor had been held immune for the presumably investigative activity of illegally seizing an allegedly obscene film.³⁷ *Cambist*, by no coincidence, happens to have been the leading, and perhaps the only, pre-*Imbler* case extending absolute immunity beyond a prosecutor's advocacy function. The *Forsyth* court first correctly distinguished *Cambist* as a common law case and then, having thus limited its direct precedential value, proceeded to attack in explicit terms its own reasoning in the earlier case,³⁸ thereby depriving *Cambist* of analogical persuasiveness as well. An actual overruling of *Cambist* would, of course, have been impossible. Nevertheless, the holding in *Forsyth*

³¹599 F.2d at 1217.

³²*Id.* at 1215.

³³552 F.2d 564 (3rd Cir. 1977).

³⁴*Id.* at 566.

³⁵599 F.2d at 1215.

³⁶475 F.2d 887 (3rd Cir. 1973).

³⁷*Id.* at 889.

³⁸599 F.2d at 1214 n.14.

does indeed advance *Imbler*-immunity by a single, somewhat small and admittedly "diluted" step, and the fact that in so doing the leading pre-*Imbler* exponents of prosecutorial immunity all but overruled their own leading case shows a plain reversal of direction. The cause of prosecutorial immunity was thus firmly advanced an inch, toward a frontier which had somehow moved closer by a mile. As will be seen, that retrenchment was not accomplished despite *Imbler* but in large part because of it.

The third was not the only circuit to have frowned upon extensions of prosecutorial immunity in the post-*Imbler* era. In a remarkable case, the District of Columbia Circuit withheld *Imbler*-immunity, as well as witness immunity, from a United States Department of Justice Special Attorney for his false statements in an open court proceeding, preliminary to a grand jury investigation, in answer to a judge's question while under oath.³⁹ If prosecutorial falsehood in court and under oath does not qualify for *Imbler*-immunity, it is extremely difficult to believe that prosecutorial defamation to the press could. Even so, a case in the Sixth Circuit court presented just that situation. In *Walker v. Cahalan*,⁴⁰ the plaintiff, after eighteen years of seeking post-conviction relief, had succeeded in obtaining a new trial for murder, resulting eventually, in entry of an order of *nolle prosequi*. A year later a state legislator introduced a private bill to reimburse the plaintiff for time spent in jail owing to false testimony and mistaken identity. The defendant prosecutor wrote a letter to a legislative committee, with copies to the press, flatly stating the guilt of the plaintiff, and the justness of the original conviction. The plaintiff sued for defamation, conceding his public figure status on appeal. Despite the insistence by the prosecutor on *Imbler* protection, the court ruled that the qualified immunity afforded by the "actual malice" standard of *New York Times v. Sullivan*⁴¹ was quite enough for the defendant and remanded for trial on the malice issue.⁴² After citing *Imbler* for the proposition that acts within the scope of quasi-judicial prosecutorial duties are immune,⁴³ the court, again citing *Imbler*, rejected extension of the proposition to non-quasi-judicial activities even though they may be within the scope of prosecutorial authority.⁴⁴

The great weight of authority has, it appears, not thought the reasoning of *Imbler* to extend beyond the quasi-judicial functions of the prosecutor. Two United States Circuit Courts of Appeals have

³⁹*Briggs v. Goodwin*, 569 F.2d 10, 29 (D.C. Cir. 1977).

⁴⁰542 F.2d 681 (6th Cir. 1976).

⁴¹376 U.S. 254 (1964), cited in 542 F.2d at 684.

⁴²542 F.2d at 685.

⁴³*Id.* at 684.

⁴⁴*Id.* at 685.

found the reasoning therein to weigh against extension to investigative or administrative functions. One of these, along with a third circuit court, has specifically withheld *Imbler*-immunity from the even less quasi-judicial function of public information. If these precedents from federal courts might have been helpful to resolution of the controversy between Foster and his defamer, however, relevant authority was also close at hand. For it will have by now occurred to those familiar with the trial by press problem that the accused was doubly-wronged—by defamation and by the potential prejudice of his right to a fair trial. Of this latter concern, the law of Indiana has much to say.

Disclosures to the press of this type are regulated by the Indiana Code of Professional Responsibility.⁴⁵ By adopting the Code,⁴⁶ the Indiana Supreme Court might be thought to have given approval to the balance therein struck between the value of a public informed of prosecutorial activities and the rights of subjects of the criminal process to have their causes heard in the courts and not on the pages of newspapers and the screens of television sets.⁴⁷ The prosecutor's comments about Foster⁴⁸ appear to have run well afoul of the strictures of DR 7-107.⁴⁹ In any case, the court seemed to have con-

⁴⁵1978 IND. CT. R. 335. The Code contains conduct-regulative Disciplinary Rules [hereinafter referred to as DRs], which establish the minimum professional standards below which no attorney may fall.

⁴⁶The Indiana Supreme Court approved the Code on March 8, 1971. *Id.*

⁴⁷See DR 7-107, *quoted in* note 49 *infra*.

⁴⁸The deputy prosecutor's comment several days after the indictment that police authorities "knew the whereabouts of huge profits plaintiff was estimated to have made during a two (2) year stint as boss of a narcotics operation," 376 N.E.2d 1206, would presumably violate DR 7-107(B)(6), forbidding any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case. It seems unlikely that this material was included in the indictment or quoted from a public record of some other sort, and thereby protected under DR 7-107(C)(9).

Had the material been available in the September 6th indictment, it would not have been newsworthy when given to the press on the 11th. The court's approach to the problem made any such considerations unnecessary on its part. Had the prosecutor confined his comments to a fair account of the indictment, not only would he be protected from disciplinary activity, but the court could have decided the case on the less far-reaching ground of record libel. This privilege for fair reports of matters of public record, even when made with knowledge of their falsity, is virtually absolute, in the sense that it may be disposed of on summary judgment. See L. ELDRIDGE, *supra* note 9, at 418-38; RESTATEMENT (SECOND) OF TORTS § 611 (1977). *But see* Henderson v. Evansville Press, Inc., 127 Ind. App. 592, 142 N.E.2d 920 (1957).

⁴⁹The text of DR 7-107 is reproduced below. It should be noted that DRs 7-107(A)(4), (A)(5), (C)(2), & (C)(3) deal with various public requests for assistance and with public warnings of danger. There are obvious risks that the innocent will be defamed by prosecutorial comment permissible under these sections. Such conduct, it is submitted, falls within the investigative and administrative functions of the prosecutor's office and is not a simple exercise of the obligation of the prosecutor to keep the public informed as to the activities of his office. This survey takes no position with

respect to the conduct of these particular functions; it may well be that the case for *Imbler*-immunity covering these particular functions is stronger than that for pure public information. Three points, however, should be noted. First, there is no reason to believe that the conduct of the defendant in *Foster* was in furtherance of these functions. Next, the court made no attempt to separate various aspects of prosecutorial public information and therefore must be taken as content to have the immunity extended to all such reports. Finally, police officers often have the functions of warning the public or seeking help from the public in an investigation. As many of the courts denying *Imbler*-immunity to prosecutors for their investigative activity have pointed out, it would be inconsistent to extend an absolute immunity to prosecutors serving a function for which police have only been extended a qualified immunity.

DR 7-107 Trial Publicity provides:

- (A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
 - (1) Information contained in a public record.
 - (2) That the investigation is in progress.
 - (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
 - (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
 - (5) A warning to the public of any dangers.
- (B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
 - (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
 - (2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
 - (3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
 - (4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
 - (5) The identity, testimony, or credibility of a prospective witness.
 - (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.
- (C) DR 7-107(B) does not preclude a lawyer during such period from announcing:
 - (1) The name, age, residence, occupation, and family status of the accused.
 - (2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
 - (3) A request for assistance in obtaining evidence.
 - (4) The identity of the victim of the crime.

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- (5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
 - (6) The identity of investigating and arresting officers or agencies and the length of the investigation.
 - (7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
 - (8) The nature, substance, or text of the charge.
 - (9) Quotations from or references to public records of the court in the case.
 - (10) The scheduling or result of any step in the judicial proceedings.
 - (11) That the accused denies the charges made against him.
- (D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.
- (E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.
- (F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.
- (G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:
- (1) Evidence regarding the occurrence or transaction involved.
 - (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
 - (3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
 - (4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
 - (5) Any other matter reasonably likely to interfere with a fair trial of the action.
- (H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:
- (1) Evidence regarding the occurrence or transaction involved.
 - (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
 - (3) Physical evidence or the performance or results of any examina-

templated that immunizable statements in at least some instances might have that aspect, for it offered that the accused might look upon DR 7-107 as a substitute for the remedy denied him by the opinion.⁵⁰ The offering of absolute immunity, therefore, leads to this uncanny result: the plaintiff in defamation will be unable to recover for maliciously false statements which, *even if they had been uttered in perfect truth*, would have rendered their speaker subject to professional sanction.

Even so, immunities by their nature engender similar, if less aggravated, results. In *Imbler* itself, for example, the prosecutor involved was relieved of a civil suit brought by the supposed victim of his allegedly purposeful use of false testimony;⁵¹ at the same time, he remained subject to the sanction of professional discipline, *inter alia*.⁵² It will be beneficial to here consider the precise reasoning process dictating this result.

Justice Powell, writing for the five-man *Imbler* majority, made a variety of arguments on varying levels of both abstraction and general applicability. The Indiana Supreme Court opinion under discussion, for example, adopted from *Imbler* the idea that “[t]he public trust of the prosecutor’s office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.”⁵³ This was but one of several statements of a like degree of abstraction and generality by the Supreme Court; for example, the statement by the Court that, “if the prosecutor could be made to answer in court each time . . . his energy and attention would be diverted from the pressing duty of enforcing the criminal law.”⁵⁴ Statements such as these, however, although no doubt relevant to determining an occasion appropriate for the granting of an absolute immunity, can hardly be said to be

tions or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.

(5) Any other matter reasonably likely to interfere with a fair hearing.

(I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

⁵⁰387 N.E.2d at 449.

⁵¹424 U.S. at 413.

⁵²*Id.* at 429. The Court also pointed to the availability of 18 U.S.C. § 242 (1976), the criminal analogue to 42 U.S.C. § 1983 (1976), as a device to protect the accused from wilful misconduct.

⁵³387 N.E.2d at 449 (quoting 424 U.S. at 424-25).

⁵⁴424 U.S. at 425.

dispositive of the matter, for they prove entirely too much; a single such principle could be taken as justifying an absolute immunity from all sorts of suits against all sorts of officials acting in the course of all sorts of duties. Justice Powell's lofty generalities, therefore, must be, and, except by the Indiana Supreme Court have been, read in conjunction with the more specific rationale developed in *Imbler*.

Two arguments of a more specific nature were considered in *Imbler*. One of these was a familiar immunity analysis and will be discussed below. The other was an unusual argument which apparently never had before appeared in the literature or cases concerning prosecutorial immunity and for which the court gave no citation. This argument was that various remedies available to the criminal accused, particularly post-conviction remedies, might be subject to decisional skewing by a judiciary mindful of the possibility that their decision in favor of the accused could result in the prosecutor being called upon to answer a civil suit.⁵⁵ Such a concern seems exaggerated, if only because the results of the remedial action within the criminal justice system would not be *res judicata* in a civil suit against a prosecutor.⁵⁶ Moreover, in cases such as *Foster*, criminal justice remedies would focus on the question of wrongful disclosures by the prosecutor, rather than the entirely separate questions of falsity, malice, and defamatory character which would characterize the defamation action, which could be brought no matter what the outcome of the post conviction action.⁵⁷

This rather curious and apparently unprecedented rationale for *Imbler* was rejected by a strong concurring opinion in that case,⁵⁸ and has since gone unrecognized in the post-*Imbler* cases, including *Foster*. In addition, a later Supreme Court opinion extending *Imbler*-like protection to administrative hearing officers and agency attorneys in the context of adjudicative hearings in which their respective roles are judicial and prosecutorial, omitted this specific argument, along with some of Justice Powell's grander generalities from its account of the reasoning of *Imbler*.⁵⁹

Finally, there is a major additional flaw in the "skewing of remedial action" argument. Like the more general arguments from the *Imbler* case, it also proves entirely too much. The argument that the judiciary will hesitate to overturn primary official action for fear of triggering retaliatory remedial action is applicable to all govern-

⁵⁵*Id.* at 427-28.

⁵⁶*Id.* at 436 n.3 (White, J., concurring). *But see* *Rosenberg v. Martin*, 478 F.2d 520 (2d Cir. 1973).

⁵⁷*But see* 478 F.2d 520.

⁵⁸424 U.S. at 436 n.3 (White, J., concurring opinion).

⁵⁹*Butz v. Economou*, 98 S. Ct. 2894, 2913 (1978).

mental officials in respect of all their decisions. Such arguments therefore have usually been thought to justify at best only a qualified immunity for governmental officials.⁶⁰ Nonetheless, there are appropriate situations for absolute immunity which have a quite familiar nature.

The proponent of an immunity relies on a special configuration of important interests, difficult judgments, and skewing dangers which are characteristic of his situation. He points first to some important public interest affected by his decision. He will then, if he can, demonstrate the importance of his decisionmaking processes by showing that incorrect decisions will prejudice the achievement of the interest; usually he will show that an interest will go completely unserved without a certain decision on his part, for example, that without his decision to prosecute, a criminal will not be brought to justice. Then, he shows that the judgments required are difficult to make. The most crucial step in the analysis lies in the proponent's demonstration that mere misjudgments are, by nature, easily confused with outright wrongful conduct, as when prosecution and malicious prosecution are difficult to distinguish. Thus, a mere error by the decisionmaker easily leads to false but colorable claims against him. The possibility of having to fight this kind of claim, riddled with ambiguities, and not claims in general, is crucial; this sort of claim presents sharp dangers to the performance of his duty, to wit, that he may skew those important judgments to the side of his personal safety rather than giving the public the independent decision these important questions require.⁶¹

The importance of the type of question presented and the thinness of the line between proper independent judgment and wrongful conduct are the most crucial elements of the case for an absolute immunity. The need for independent judgment should not be made into a general excuse for the violation of rights. Only where independence of judgment is particularly important and especially at risk should an absolute immunity be granted. Qualified immunities tested by "good faith" exist in abundance to protect the public interest in cases in which the boundary between the required and the forbidden is troublesome. Absolute immunity should be reserved for cases presenting unusually difficult determinations. In *Imbler*, the immunity was extended to such prosecutorial determinations as the truthfulness of witnesses and the question of whether a given piece of evidence was subject to surrender to defense counsel.⁶² In *For-*

⁶⁰424 U.S. at 436-37 (White, J., concurring opinion).

⁶¹This is essentially the analysis of Justice Powell in *Imbler*. See *id.* at 422-28 (majority opinion).

⁶²*Id.* at 413.

syth v. Kleindeinst,⁶³ the one court, which extended *Imbler* to any extrajudicial function, protected a determination of the constitutionality of an evidence gathering technique. Both of these cases dealt, then, with prosecutorial decisions that were heavily clouded with extremely difficult questions of law. The special difficulty of making such determinations presents the greatest risks of skewing of decision, and, when coupled with the importance of unskewed decision, calls for the elevation of an immunity from qualified to absolute.

The call for an immunity may thus be loud or soft, depending upon the precise configuration of the above-discussed elements inhering in the situation presented.⁶⁴ Regardless of the volume of the call from the proponents side, however, the interests of the would-be plaintiff should not simply be ignored. Those interests will weigh themselves, with varying strength, against the grant of immunity. Some of this weight, in turn, may be relieved by substitute protec-

⁶³599 F.2d 1203 (3d Cir. 1979). See text accompanying notes 27-38 *supra*.

⁶⁴Consider the following somewhat fanciful case. While the jury is deliberating in a criminal case, the prosecutor sneaks into the jury room and proceeds to re-present his case, this time without the disadvantages concerning admissibility of evidence and the like which normally provide protection for the accused. Notwithstanding statements in *Imbler* that the immunity extends to conduct and presentation of a case, protection is doubtful; a court presented with a 42 U.S.C. § 1983 (1976) suit would no doubt conclude that such acts did not constitute steps in the protection area of advocacy. Indeed, he would almost certainly be denied a "good faith" defense allowed by a qualified immunity. But why should this be so?

The reasoning which would justify the total deprivation of immunity begins with the clarity of the rule which forbids entry into the jury room. Because the rule is clear, there is no danger that permitted duties will be infringed by the skewing of decisions to avoid later second-guessing of ambiguous conduct. The prosecutor simply cannot be allowed to claim that a legitimate function might be jeopardized for fear of an inadvertent violation of a clear rule. Added to this principal reason is the fact that the public interest in no way hinges on his decision to undertake such action, as a procedure for presentation of his case already exists in the normal courtroom processes.

The example, fanciful as it is, bears a family resemblance to *Foster*, in which the prosecutorial conduct consisted of extrajudicial, and maliciously false comments banned by rules regulating the conduct of the criminal process for precisely the reason that such conduct may influence jurors, albeit only potential jurors at the time of the conduct. A more apt analogy to the conduct of the *Foster* prosecutor would be to the behavior of counsel who in conducting his case before the jury attempted to introduce irrelevant, but knowingly false testimony. Even before the "wrong" of admitting irrelevant but prejudicial testimony was "doubled" by being done with knowing falsity, the prosecutor would normally be prevented from engaging in the conduct at all. The need to protect the accused from knowing and irrelevant falsity would ordinarily not arise because the accused would already have received the benefits of judicial guarantees of trial on the merits of the case alone. Analogously, the prosecutor should likewise be barred from speaking in excess of what DR 7-107 permits even when such comments are not aggravated by knowing falsity. Within the courtroom, the accused has the protection of relevancy, or at least rebuttal, vastly more protection than was accorded the plaintiff in *Foster*. See text accompanying notes 65-75 *infra*.

tion of the plaintiff's interests through disciplinary rules, criminal actions, or the like.

The principal duty of a prosecutor, is, of course, to advance the pleas of the state in criminal cases.⁶⁵ In addition, the relevant Indiana law provides for an investigative function⁶⁶ and an assortment of administrative duties.⁶⁷ Nowhere has the legislature provided for a public information as such. The court did not cite any authorities from which the importance of the public information function might be determined, save a bare reference to DR 7-107 in another context.⁶⁸ Inspection of that rule suggests that the public information function is of limited importance. In a case under investigation, for example, the prosecutor's realm of disclosure for public information is limited to matters in the public record, the fact that an investigation is in progress, a description of the offense, and the scope of the investigation.⁶⁹ Legislative silence and supreme court promulgation of the Disciplinary Rules combine to indicate that the public information function of prosecutors is to be of no more than secondary importance.

Most of the information which a prosecutor might care to give out in performance of this function, and possibly in violation of the Disciplinary Rules, is readily available to the press in any case.⁷⁰ The press is protected by a generous privilege in reporting matters of public record,⁷¹ including the indictment in the case or matters of public interest.⁷² The voracious appetite of the press for details of crime and its suspected perpetrators can be more than adequately satisfied by public records; by interviews with witnesses, victims, and members of the victim's family; and by other sources. Law enforcement officials such as the police, not bound by the Code of Professional Responsibility, can be relied upon to speak quite freely even though they lack the protection of absolute immunity. Finally, the prosecutor himself may bring relevant information forth with absolute immunity in the indictment,⁷³ or at trial, or following

⁶⁵IND. CODE § 33-14-1-4 (1976 & Supp. 1979).

⁶⁶*Id.* § 33-14-1-3 (1976).

⁶⁷*Id.* §§ 33-14-2-1, -5-1, -6-1.

⁶⁸*See* 387 N.E.2d at 449.

⁶⁹DR 7-107(B), *supra* note 49. Additional disclosures are permitted for the purposes of seeking information from the public and warning the public about dangers. *Id.*

⁷⁰*See generally* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Approved Draft, 1966) [hereinafter cited as ABA PROJECT].

⁷¹L. ELDRIDGE, *supra* note 9, at 419-38.

⁷²*See, e.g.,* Patten v. Smith, 360 N.E.2d 233, 236-37 (Ind. Ct. App. 1977).

⁷³The prosecutor would be protected by the judicial proceedings privilege, which is discussed at text accompanying notes 9-18 *supra*. Statements made would, of course, be subject to rebuttal or other testing by the defamed party. *See* text accompanying notes 17 & 84.

disposition of the case.⁷⁴

The public information function, then, at least in the form of prosecutorial comment on a matter concerning an accused under indictment and pending trial as presented in *Foster*, serves an interest of little importance which is likely to be well served in other ways. Moreover, the presence of the crucial feature which calls for immunity, that of significant skewing dangers, may also be doubted. When compared to the difficulties of determining the truthfulness of a witness or the constitutionality of the seizure of an item of evidence, a determination of conduct as allowed or forbidden by DR 7-107 appears elementary. The Rule, when matched against the criteria for a prosecutor's turnover of evidence to defense counsel or the mysteries of the fourth amendment,⁷⁵ seems positively black-letter in nature, as clear at least as legal propositions are ever likely to be.⁷⁶

These aspects of DR 7-107 should come as no surprise. The evident purpose of that rule was to protect the right of the accused to a fair trial by keeping that trial in the courtroom and out of the press.⁷⁷ It would not be unfair to say that the Rule was carefully designed with the skewing of decisions in mind; indeed, it was designed to give maximum encouragement to the skewing of judgments in the direction of nondisclosure. The Indiana court's projection of a fear that skewing will lead to insufficient disclosure for the public interest is precisely in opposition to the purpose and the strictures of the Rule.

The call for an absolute immunity for prosecutorial public information concerning cases within the prosecutor's office is therefore considerably less loud than the call in *Imbler*, generated by highly significant public interests in the conduct of trials by prosecutors, performable only by them, coupled with the particularly high risks of skewing difficult judgments. If, however, there is little call for an absolute immunity, and much in the Indiana Supreme Court's own disciplinary rules calls against it, there is in the *Foster* situation very little by way of substitute protection to shoulder the weight of

⁷⁴The provisions of DR 7-107 apply only at the times indicated therein. One might ask, however, what would justify prosecutorial comment on those who have already either been duly convicted or have come through the criminal justice process successfully.

⁷⁵U.S. CONST. amend. IV.

⁷⁶DR 7-107 has been successfully challenged, in part on the ground of vagueness, as applied to defense attorneys, and the great bulk of the Rule survived the charge. See, e.g., *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975). The court cast doubt on the applicability of its determination to government attorneys. See *id.* at 253.

⁷⁷ABA PROJECT, *supra* note 70, at 51, 80-82.

the twin interests of the accused in a fair trial and in an unimpaired reputation.

Unlike the plaintiff in *Imbler*, who had available not only provisions of the Code of Professional Responsibility, but the criminal provisions of federal civil rights law as well,⁷⁸ complainants of prosecutorial defamation may never have been tried, indicted, or even so much as arrested, and would consequently be unlikely candidates for any form of federal civil rights protection, civil or criminal.⁷⁹ Nor could they any longer avail themselves of an Indiana criminal defamation statute.⁸⁰ Thus, this group of potential victims of prosecutorial defamation would be left with nothing but the disciplinary rule to protect them.⁸¹ Because such victims are entitled to such protection as DR 7-107 affords them for even entirely truthful comments by the prosecutor,⁸² leaving them with only that Rule as a protection for the malicious falsehoods of a prosecutor is to leave them with exactly no additional protection from the malicious falsehoods themselves.⁸³ The accused thus gets but a single protection though sustaining a double wrong.

For those among the defamed who are brought to trial, the potential harm which DR 7-107 is designed to prevent, an unfair trial, is heaped upon the harm from defamation. At this point, federal criminal civil rights law protection might be available. It is, however, in the case which reaches trial that the *Imbler* opinion, its general remarks to one side, is most pertinent, and where its specific rationale for quasi-judicial absolute prosecutorial immunity weighs most heavily. The weight, however, is decisively against ex-

⁷⁸424 U.S. at 429.

⁷⁹Simple defamation is an insufficient basis for relief under 42 U.S.C. § 1983 (1976). *Paul v. Davis*, 424 U.S. 693 (1976).

⁸⁰The new Penal Code has no provision for criminal defamation. There is, however, a provision for criminal mischief. *See* IND. CODE. § 35-43-1-2 (Supp. 1979). Application of so vague a statute to speech conduct would seem unlikely to withstand constitutional challenge, but even if that were not so, it seems unlikely that a county prosecutor would pursue even a predecessor of the opposite political party for acts committed in the name of public relations.

⁸¹Or nothing at all if *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), could be extended to prosecutors. As members of the government not speaking about government, but about an individual criminal accused, prosecutors present a much weaker claim for first amendment protection than do defense attorneys. *Compare* *Garrison v. State of Louisiana*, 379 U.S. 64 (1964), and *Hutchinson v. Proxmire*, 99 S. Ct. 2675, 2686-87 (1979), with 522 F.2d at 253 (dicta).

⁸²Presumably, a mere mention of an individual in conjunction with an investigation, where forbidden by DR-7-107(B), would be an unreasonable invasion of privacy, even if nondefamatory.

⁸³Were the civil action in *Foster* allowed, the plaintiff might have had compensable claims in both defamation and privacy. He might also have been able to receive punitive damages.

tension to any prosecutorial public relations activity, defamatory or otherwise.

The major "prosecutor-specific" rationale offered by Justice Powell in support of the *Imbler* decision came in the following words:

Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. The veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence.⁸⁴

The Court also stated in a footnote to its opinion that "[i]n the law of defamation, a concern for the airing of all evidence has resulted in an absolute privilege for any courtroom statement."⁸⁵

Although Justice Powell's more general arguments might have applicability in the extension of *Imbler* to an assortment of other cases, the foregoing specific argument makes quite clear that the principal reason for *this* holding in *this* case is to prevent such skewing of prosecutorial decision which might prove harmful to the judicial process, specifically to the interest in the unhampered presentation of cases, and not to prevent harm to vaguely articulated general interests of the public in an unhampered prosecutor. In an earlier passage, Powell had characterized the immunity of prosecutors as being based on the same considerations which underlie the grant of immunities to judges and grand jurors.⁸⁶ In a later passage, he noted that the activities in question were intimately associated with the judicial phase of the criminal process "and thus were functions to which the reasons for absolute immunity apply with full force,"⁸⁷ thereby indicating that his own armamentarium of abstractions about uninhibited prosecutorial conduct was to be read in context with the specific quasi-judicial situation before him.

The nature of the quasi-judicial situation which was the gravamen of the *Imbler*-immunity was further clarified in *Butz v. Economou*,⁸⁸ which extended such protection to federal agency hearing examiners and attorneys engaged in the hearing and presenting

⁸⁴424 U.S. at 426 (citation omitted).

⁸⁵*Id.* at n.23.

⁸⁶*Id.* at 422-23.

⁸⁷*Id.* at 430.

⁸⁸98 S. Ct. 2894 (1978).

of evidence. Circumscribing the extension carefully in terms of the rationale, the Court stated:

The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. . . . Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

At the time same time, the safeguards built into the judicial process tend to reduce the need for private damage actions *Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court.* Jurors are carefully screened to remove all possibility of bias. Witnesses are . . . subject to the rigors of cross-examination and the penalty of perjury. . . . [T]hese features tend to enhance the reliability of information and the impartiality of the decisionmaking process

. . . .

Evidence which is false or unpersuasive should be rejected upon analysis by an impartial trier of fact.⁸⁹

Imbler-immunity is justified because it operates when appropriately applied in aid of these processes of fair trial, processes which themselves contain protections for the accused more valuable and effective than the whole array of common-law causes of action, disciplinary rules, and federal civil rights remedies. Yet, it is these most valuable of protections which even truthful and nondefamatory utterances in violation of DR 7-107 tend to subvert. Whatever "extensions" of *Imbler* to prosecutorial administrative and investigative activities might be justified, their number does not, for it cannot include efforts to immunize prosecutors from extra-judicial conduct which endangers that which *Imbler* itself was calculated to protect. The purposes of *Imbler*, DR 7-107, and the common law rule of *Kennedy*, denying an attorney's right to take his quasi-judicial privilege to the pressroom, are in this respect identical, for each is intended to enhance the likelihood of impartial trial *in the courtroom*, where the rights or liabilities of the accused are best and most fairly determined.

Foster, then, can in no sense be read to extend quasi-judicial immunity. The case, however, might be seen as extending absolute immunity from suit in defamation to prosecutors as executive officers

⁸⁹*Id.* at 2913-16 (emphasis added).

on the theory of *Barr v. Mateo*,⁹⁰ which has generally been construed as creating a complete immunity from common law damage actions for any federal executive official.⁹¹ That line of authority has been sharply denounced by several commentators, including Dean Prosser,⁹² and has been adopted as a matter of state law, in not more than two, and perhaps only one, of the states.⁹³ The Indiana court was apparently aware of the doctrine and aware that most states granted absolute privilege only to high-ranking executive officers, because it made passing mention of the incongruity of a pair of examples from the *Restatement (Second) of Torts*, the one noting the absolute immunity of attorneys general, the other postulating the qualified immunity of prosecutors.⁹⁴ The court, however, said nothing further to suggest any support for a broad doctrine. In addition, the doctrine has no other history in Indiana, and there is authority to the contrary.⁹⁵ Even if this or another state were to adopt that doctrine as generally applicable, an exception for comment by a prosecuting attorney about cases pending in his office would seem wise. The thought that under the *Barr* doctrine even less deserving claims of immunity, if any there be, would also be protected by a blanket absolute immunity, suggests that Dean Prosser, as usual, knew whereof he spoke.

Although the court let pass the opportunity to ground its opinion on the doctrine of *Barr v. Mateo*, it furnished an alternative theory of the case, stating: "[W]e also note that the duty to inform the public can be characterized as a discretionary function"⁹⁶ and thus protected by the Indiana Tort Claims Act.⁹⁷ The court, offering in addition to some Powell-like abstractions only that rather cryptic comment, did not explain how a prosecutor could have discretion to issue statements not specially authorized by the legislation, but for-

⁹⁰360 U.S. 564 (1959).

⁹¹See L. ELDRIDGE, *supra* note 9, at 399.

⁹²See authorities cited in L. ELDRIDGE, *supra* note 9, at 402 n.83, including this from Dean Prosser:

[T]he effect of the federal rule is to leave the plaintiff without any remedy for major and outrageous abuses of official power. Since the days of John Wilkes, the whole English and American tradition has been against such a result, and recent political abuses have not been so lacking as to make the position at all attractive.

RESTATEMENT (SECOND) OF TORTS § 591, Note to the Institute, at 107 (Tent. Draft No. 12, 1966).

⁹³L. ELDRIDGE, *supra* note 9, at 413-14.

⁹⁴387 N.E.2d at 449 (citing RESTATEMENT (SECOND) OF TORTS § 591, Comment f, Illustrations 3-4 (1956)).

⁹⁵Henry v. Moberly, 6 Ind. App. 490, 33 N.E. 981 (1893).

⁹⁶387 N.E.2d at 449 (emphasis added).

⁹⁷*Id.* (citing IND. CODE § 34-4-16.5-3(6) (1976)).

bidden by the court's own disciplinary rules, and which also violate a private duty owed to the accused to refrain from defaming him. The general immunity doctrines concerning governmental entities and, derivatively, employees are a nightmare of similarly cryptic comment from the Supreme Court⁹⁸ codified by equally cryptic legislation.⁹⁹ In these conditions, classifying the prosecutorial public information function as discretionary, without further comment, is unhelpful.

In *Board of Commissioners v. Briggs*,¹⁰⁰ Judge Lowdermilk made a "Sherlockian" effort to unravel these mysteries. His solution, as applied to *Foster v. Percy*, would appear to allow only a qualified immunity, tested by a good faith test, to a prosecutor who exceeded the scope of his authority to give public information by passing the boundaries drawn by DR 7-107.¹⁰¹ Absent good faith, the prosecutor would become subject to the law of defamation, which would presumably afford the *additional* constitutional privilege of comment on a matter of public interest absent a showing of actual malice as to the truth of the utterances. Alternatively, the *Briggs* analysis might yield the existence of a discretionary authority to make the decision to comment, but the execution of that decision would become ministerial and thus not immune from torts committed in such execution.¹⁰² This second approach would leave the prosecutor with only the constitutional defamation privilege.

As Dean Prosser pointed out, the ministerial-discretionary distinction is "finespun and more or less unworkable,"¹⁰³ the distinction "being at most one of degree."¹⁰⁴ Because Indiana is at least temporarily stuck with that distinction, wisdom would counsel that the determination of such questions of degree be made in conjunction with some sort of functional analysis of situations calling for immunity similar in nature to that suggested earlier in this discussion. Further work in this area is obviously needed.

The Supreme Court's choice of the term, to "note" rather than to "hold," in stating that the duty to inform the public was discretionary, coupled with its statement basing the decision "primarily" on traditional, personal immunity of the prosecutor at common law, may be seen as a deliberate weakening of the authority of the sovereign immunity portion of its opinion. The most likely explanation of why a court would be willing to so diminish a part of its opinion which would normally qualify as an alternate holding, is that the

⁹⁸See, e.g., *Campbell v. State*, 259 Ind. 55, 62-63, 284 N.E.2d 733, 736-37 (1972).

⁹⁹See IND. CODE § 34-4-16.5-3(6) (1976).

¹⁰⁰337 N.E.2d 852 (Ind. Ct. App. 1976).

¹⁰¹See *id.* at 855.

¹⁰²See *id.* at 857.

¹⁰³W. PROSSER, *supra* note 14, at 989.

¹⁰⁴*Id.* at 990.

court is uncertain of itself in this area and prefers to bind both the lower courts and, to a lesser degree, itself only loosely or not at all pending further judicial or academic development of sounder theories of Indiana governmental immunity than have heretofore appeared.¹⁰⁵ The wait may be a long one.

Pending the development of a comprehensive analysis of the sovereign immunity doctrines in this state, the best answer that can be given to the *Foster* question would be the denial of absolute immunity, either leaving the prosecutor but a qualified immunity on facts appearing therein, or the double-qualified immunity of a good faith belief that the making of such remarks was within the duty-limits set by DR 7-107 and an ordinary constitutional privilege of comment on public issues. The "double-immunity" would permit a defendant prosecutor to admit that comment was improper but assert a good faith belief in the truth of his remarks, or even admit his knowing falsity with respect to the truth of the remarks while maintaining an honest belief that the occasion would have been a privileged one. With this double protection, an honest prosecutor would have little to fear when facing the question of permissible disclosure under the black-letter terms of DR 7-107. Greater protection than this is unnecessary.

The decision in *Foster v. Percy* was an extension of prosecutorial immunity in service to a relatively unimportant public interest already adequately served in other ways and by other sources. It gave unnecessary protection to honest prosecutors, while shielding those who act with malice. It was illogical and not only contrary to, but subversive of, the great weight of authority, the authorities on which the opinion itself drew, and the supreme court's own disciplinary rules. When it is recalled that the defendant-attorney in *Kennedy v. Cannon*, who sought no more than to protect his black

¹⁰⁵There is a less likely explanation. By introducing an alternate theory and then weakening it, the court makes clear that the alternate theory is definitely not an adequate explanation of the case. This explanation could be said to significantly strengthen the holding of *quasi-judicial* immunity by making later judges unable to distinguish *Foster* on the ground that it was a case in which two grounds of immunity combined to produce the result. This might be important to the future expansion of quasi-judicial immunity of prosecutors, but *Foster* itself expands that immunity so far the maneuver of weakening an alternate theory would have been otiose. By clearly grounding *Foster* in quasi-judicial immunity, however, the court also gives significant strength to *judicial* immunity itself. Indeed, if a prosecutor has a mere quasi-judicial immunity to comment on cases pending in his office, *a fortiori*, a chief justice of a supreme court would have an absolute immunity to comment on virtually any matter of legal significance in the state; for example, the teaching methods of a law professor who has written a severely critical article. A later court might fail to realize the true meaning of *Foster*, however, if it thought that the decision could be explained as simply an example of ordinary statutory immunity.

client in a rape case from lynching in a sleepy Southern town, was accorded neither absolute nor qualified immunity for fear that he would conduct a trial-by-press, one can only suspect that the reason for the decision in *Foster* was no more than that a prosecutor is a prosecutor. So, too, a judge is a judge,¹⁰⁶ and a king, a king.

¹⁰⁶See note 105 *supra*.

XVII. Trusts and Decedents' Estates

The law of estates generally develops only by slow accretion, and hence the developments in any particular year are often unspectacular. This survey period was no exception. Although several novel cases arose, few significant changes occurred in the law.¹

¹The courts decided several cases of minor importance during the survey period. *In re Estate of Garwood*, 382 N.E.2d 1020 (Ind. Ct. App. 1978) involved an appeal from an interlocutory order for the sale of real property in the course of probate administration. The majority refused to consider the appeal because the record had not been timely filed. *Id.* at 1022. In a concurring opinion, however, Judge Lybrook discussed the propriety of classifying the appeal as interlocutory. Although he agreed with the majority's decision to dismiss the appeal, he disagreed with the classification of the appeal as interlocutory. In particular, he expressed concern that the majority had failed to consider the provisions of IND. R. TR. P. 54(B) before dismissing the appeal. *Id.* at 1022 (Lybrook, J., concurring).

In *Gaunt v. Peoples Trust Bank*, 379 N.E.2d 495 (Ind. Ct. App. 1978), the executor of the estate of Clara Gaunt filed a complaint alleging that the bank had been negligent in allowing the decedent to open a joint account with right of survivorship without ascertaining her wishes or informing her that at her death the proceeds would pass to her son rather than to her estate. Actually, the son, not the decedent, took the steps necessary to create a joint account: He got a card from the bank permitting his name to be added to the decedent's account, obtained the decedent's signature, and returned the card to the bank. The court of appeals affirmed judgment in favor of the bank, holding that the relationship between a bank and its customers does not, in most circumstances, impose such a duty of inquiry. *Id.* at 496. The court did not specify the circumstances under which such a duty might arise. *Id.*

In *In re Estate of Swank*, 375 N.E.2d 238 (Ind. Ct. App. 1978), the court of appeals dealt with an attempt by the testatrix's daughter either to have the testatrix's son removed as personal representative or to have a special administrator appointed to examine a questioned real estate transaction between the testatrix and the son. The trial court had dismissed the removal petition. In response to the daughter's first contention that the son's motion to dismiss her petition for removal was untimely for failure to comply with the 20-day responsive pleading requirement of IND. R. TR. P. 6(C), the court of appeals held that the petition was not a complaint instituting a new action. *Id.* at 240. Instead, "the filing . . . [was] merely ancillary to the probate of [the] will and the administration of [the] estate." *Id.* Hence, the personal representative was not obligated to file a responsive pleading pursuant to IND. R. TR. P. 6(C). *Id.* The court held that the personal representative's motion to dismiss operated as a written objection to the daughter's removal petition. *Id.* As such, timeliness of the motion was governed by § 29-1-1-10 of the Probate Code, and could be filed at any time prior to the day of the hearing. 375 N.E.2d at 240 (citing IND. CODE § 29-1-1-10 (1971) (current version at *id.* § 29-1-1-10 (1976))).

The court next held that the trial court's refusal to appoint a special administrator was not improper in light of the daughter's failure to allege "fraud, unlawful influence or incompetency" in connection with the transaction 10 years earlier between the testatrix and the personal representative. 375 N.E.2d at 241. In addition, the court did not find error in the lower court's refusal to remove the personal representative in light of the daughter's failure to allege any statutory grounds therefor under § 29-1-10-6 of the Probate Code. *Id.* (citing IND. CODE § 29-1-10-6 (1971) (current version at *id.* § 29-1-10-6 (1976))).

A. Judicial Developments

1. *Assignment of Expectancy.*—The most significant change in the law during the survey period occurred in the area of assignment of expectancy. In *Kuhn v. Kuhn*,² the court of appeals revised the Indiana version of the doctrine of assignment of expectancy by deleting from it the requirement that the ancestor from whom the expectancy is derived know and approve of the assignment. Although the change brought Indiana's version into line with the version accepted in most jurisdictions,³ the case creates several problems because the assignment at issue was actually of a vested interest rather than of an expectancy.

In *Kuhn*, the adult children of Charles Kuhn brought an action in equity to enforce a written assignment of a two-thirds expectant interest in their grandmother's estate that had been executed by Charles during a divorce in 1964.⁴ Apparently, the children sought to procure an interest in real property then held by Charles and his second wife as tenants by the entirety.⁵ Charles had acquired a vested remainder interest⁶ in the real property as a result of a devise from his grandfather in 1954. The interest was subject to the

²385 N.E.2d 1196 (Ind. Ct. App. 1979).

³RESTATEMENT OF PROPERTY § 316 (1940), provides:

A person who is an expectant distributee has the power, for a fair consideration, by an otherwise effective transaction inter vivos

(a) to relinquish his interest or any part thereof;

(b) to bind his interest, or any part thereof, so that any specified interest, otherwise derivable by him as a realization upon such interest, shall belong, when derived, to his obligee.

Most states uphold the assignability of an expectant interest provided fair consideration is furnished. *E.g.*, *Bridge v. Kedon*, 163 Cal. 493, 126 P. 149 (1912); *Thornton v. Louch*, 297 Ill. 204, 130 N.E. 467 (1921); *Betts v. Harding*, 133 Iowa 7, 109 N.W. 1074 (1906); *In re Stephens*, 64 N.Y.S. 990 (Sur. Ct. 1900); *Hale v. Hollon*, 90 Tex. 427, 39 S.W. 287 (1897); *Hoyt v. Hoyt*, 61 Vt. 413, 18 A. 313 (1889).

After the decision of the Indiana Court of Appeals in *Kuhn*, only Michigan continues to require the knowledge and consent of the ancestor from whom the expectancy is to be derived. *See Stevens v. Stevens*, 181 Mich. 438, 148 N.W. 225 (1914). However, in Kentucky, any attempted assignment of an expectancy is void. *Engle v. Waller*, 282 Ky. 732, 140 S.W.2d 402 (1940). *See generally Evans, Certain Evasive and Protective Devises Affecting Succession to Decedents' Estates*, 32 MICH. L. REV. 478, 488-90 (1934); Note, *Descent and Distribution—The Right of a Prospective Heir to Release or Assign an Expectancy*, 35 N.C.L. REV. 127 (1956).

⁴By the instrument, Charles purported to assign "[a]ll right, title and interest to two-thirds (2/3) of his entire expectancy in the estate of the said Myrl Kuhn, which the assignor now holds or is entitled to upon the death of the said Myrl Kuhn." 385 N.E.2d at 1198.

⁵Although the court did not specifically state what property the children sought to procure, the real property was the only property discussed by the court.

⁶*Pointer v. Lucas*, 131 Ind. App. 10, 169 N.E.2d 196 (1960), is the most recent Indiana case defining a vested remainder. The court stated:

life estate interest of Charles' mother, Myrl Kuhn, and to Charles' attaining the age of thirty.⁷

Although the court's language is unclear, the children apparently contended that the real property was subject to the written assignment of expectancy because of an oral misrepresentation made by Charles to his first wife, Dorothy, at the time of execution of the assignment. Charles had stated that he held a mere expectant interest in the real property.⁸

The Indiana Court of Appeals, following the Bartholomew Circuit Court,⁹ held that the issue was one of assignment of expectancy.¹⁰ The court first disposed of the leading Indiana decisions on assignment of expectancy, *McClure v. Raben*,¹¹ by stating

"A remainder is to be considered vested when a presently identifiable person in being would have a right to the immediate possession on determination of the intermediate particular estate, although the remainder may terminate prior to the ending of the precedent estates, or may be divested by the exercise of an outstanding power to dispose of the fee. An estate in remainder is not rendered contingent by postponing the time of possession or enjoyment; the uncertainty which distinguishes a contingent remainder is the uncertainty of the right, not the uncertainty of enjoying possession."

Id. at 27, 169 N.E.2d at 204-05 (quoting 26 C.J.S. *Deeds* § 114, at 933-34 (1956)). See *Heilman v. Heilman*, 129 Ind. 59, 28 N.E. 310 (1891); *Summers v. Old-First Nat'l Bank & Trust Co.*, 105 Ind. App. 9, 13 N.E.2d 320 (1938).

If the interest in *Kuhn* had been subject solely to the life estate of the mother, a vested remainder would have resulted. The additional requirement, postponing enjoyment until the remainderman reached the age of 30, affected only the time of possession and not the certainty of the right, and thus the interest was still a vested remainder.

⁷385 N.E.2d at 1197.

⁸*Id.* at 1199.

⁹The Bartholomew Circuit Court had held that the case involved an assignment of expectancy and was thus governed by *McClure v. Raben*, 125 Ind. 139, 25 N.E. 179 (1890), *rehearing granted*, 133 Ind. 507, 33 N.E. 275 (1892). In accordance with *McClure*, the trial court held that the assignment was invalid for failure to obtain the consent of the ancestor from whom the expectancy was to be derived. The trial court also found the assignment invalid for lack of full and adequate consideration, because the assignment was executed by Charles as a gift to the children, and not as part of the divorce settlement. 385 N.E.2d at 1198.

¹⁰385 N.E.2d at 1199-1200.

¹¹125 Ind. 139, 25 N.E. 179 (1890), *rehearing granted*, 133 Ind. 507, 33 N.E. 275 (1892). The *McClure* decisions required that the assignment "appear to be a perfectly fair transaction, . . . that actual, full and fair market value [be] paid for the property, and . . . that [the assignment be] made known to the ancestor . . . from whom the estate is expected . . . and his consent obtained . . ." 125 Ind. at 146-47, 25 N.E. at 181-82. The court noted that the requirements were designed to prevent the perpetration of fraud upon the ancestor and stated that a strong presumption of fraud exists with respect to such assignments. *Id.* Other Indiana cases which have followed *McClure v. Raben* are: *Hight v. Carr*, 185 Ind. 39, 112 N.E. 881 (1916), and *Farmers' Loan & Trust Co. v. Wood*, 78 Ind. App. 147, 134 N.E. 899 (1922).

The *Kuhn* court held that in the case of family settlements, inadequate considera-

that they had been "limited to their facts, if not impliedly overruled, by *McAdams v. Bailey*."¹² The court then eliminated two elements from *McClure*'s definition of an assignment of expectancy—the knowledge and consent of the ancestor from whom the expectancy is to be derived. The court reasoned that the application of a standard of unconscionable conduct to the transaction would provide sufficient protection against fraud, and thus that the standards developed ninety years earlier to protect the ancestor from fraud were no longer needed.¹³

Apparently implementing what it perceived to be the *McAdams* version of the doctrine of assignment of expectancy, the court applied the doctrine of equitable assignment.¹⁴ The court observed that the conveyance of an expectancy and the subsequent "reliance or other consideration of the assignee" results in an executory contract which is enforceable in equity.¹⁵ The court examined the facts and held that Charles had a vested interest in the property, that he misrepresented to the children that the interest was an expectancy, that the children's guardian relied upon the assignment, and that Charles renounced the transfer to his gain. An equitable assignment was thus created.¹⁶

In analysis, the court unnecessarily overruled the *McClure* doctrine of assignment of expectancy, because no assignment of expectancy arose in this case. Instead, the issue before the court was whether grounds existed to take an oral assignment of a vested remainder out of the Statute of Frauds.

Charles held a vested remainder interest in the property, and thus his interest was not an expectant one.¹⁷ The rule is clear that a vested remainder interest can be assigned.¹⁸ Once having identified

tion—instead of the full and adequate consideration established by *McClure*—would be acceptable. 385 N.E.2d at 1199.

¹²385 N.E.2d at 1199 (citing *McAdams v. Bailey*, 169 Ind. 518, 82 N.E. 1057 (1907)).

¹³385 N.E.2d at 1200.

¹⁴*Id.* at 1199. The doctrine of equitable assignment has been used infrequently in Indiana, and thus it is not well developed. Courts state only that an equitable title can be enforced in equity, and that legal title is not necessary. *Crim v. Fleming*, 101 Ind. 154 (1885); *Board of Comm'rs v. Jameson*, 86 Ind. 154 (1882); *Burson v. Blair*, 12 Ind. 371 (1859). See generally Note, *Creation of an Equitable Assignment*, 21 ST. JOHN'S L. REV. 202 (1947).

¹⁵385 N.E.2d at 1199.

¹⁶*Id.*

¹⁷*Id.*

¹⁸The RESTATEMENT OF PROPERTY § 162(1) (1936) provides: "(1) The owner of any remainder or executory interest in land has the power, by an otherwise effective conveyance inter vivos, to transfer his interest or any part thereof." At common law, a vested remainder could be transferred because a right *in esse* existed. However, the common law refused to permit transfer of a contingent remainder. Courts of equity employed a nonrestrictive rule with respect to assignment of contingent remainder in-

the nature of Charles' interest, the next object of the court's inquiry should have been whether an assignment had taken place. The court stated that an assignment occurred,¹⁹ but was unclear as to how. Apparently, the court reasoned that the written assignment implicitly conveyed the interest because Charles had orally represented the interest as an expectancy subject to the assignment. Nevertheless, any actual assignment of the interest depended upon Charles' oral statement, and thus the assignment violated the Statute of Frauds.²⁰ The court stated that there was detrimental reliance on the part of the guardian of the children,²¹ but did not specifically mention what reliance brought the assignment out of the Statute of Frauds.²² Whether an equitable assignment was created is thus unclear.

Furthermore, the court improperly cited *McAdams* to overrule *McClure*. *McAdams* dealt with the alienability of a vested remainder²³ and limited the holding of *McClure* to the area of assignment of expectancy; the court refused to extend *McClure*'s holding

terests: "Equity, however, has . . . given effect to assignment of every kind of future and contingent interests and possibilities in real and personal property, when made upon a valuable consideration." 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 168 (5th ed. S. Symons 1941).

Although no Indiana case has explicitly held that vested remainders are transferable, Indiana courts have upheld assignments of vested remainders in cases in which the issue of their validity has arisen. *Oldham v. Noble*, 117 Ind. App. 68, 66 N.E.2d 614 (1946); *Dibble v. Lloyd*, 73 Ind. App. 320, 127 N.E. 453 (1920).

¹⁹"The legal signification of the word 'assign' is to transfer; to set over to another." *Reagan v. Dugan*, 112 Ind. App. 479, 489, 41 N.E.2d 841, 845 (1942).

²⁰IND. CODE § 32-2-1-1 (1976), which states in relevant part: "No action shall be brought in any of the following cases: . . . Fourth. Upon any contract for the sale of lands" *Id.*

²¹385 N.E.2d at 1199.

²²The recent case of *Lawshe v. Glen Park Lumber Co.*, 375 N.E.2d 275 (Ind. Ct. App. 1978), offers a good discussion of the grounds for imposition of the doctrine of equitable estoppel. The doctrine is applicable if there exists detrimental reliance sufficient to bring a parol contract out of the Statute of Frauds.

The court stated:

The basis for the doctrine of equitable estoppel is fraud, either actual or constructive, on the part of the person estopped.

. . . .

The mere nonperformance of an oral promise which falls within the scope of the Statute does not constitute such a fraud as would warrant the intervention of a court of equity. But, if one party is induced by another, on the faith of an oral promise, to place himself in a worse position than he would have been in had no promise been made, and if the party making the promise derives a benefit as a result of the promise, a constructive fraud exists which is subject to the trial court's equity jurisdiction.

Id. at 278 (citations omitted).

²³In *McAdams*, a vested remainder was created by operation of a statute which prohibited a remarrying widow from transferring real estate acquired from her first husband to anyone but the offspring of the first marriage. 169 Ind. at 527, 82 N.E. at 1061.

to the area of alienability of a future interest.²⁴ The effect of *Kuhn* is to leave an area of law that had been clear for nearly ninety years in a state of confusion.

2. *Ademption by Extinction*.—In *Weaver v. Schultz*,²⁵ the court of appeals held that a bequest of the proceeds of a life insurance policy to the testator's daughter was adeemed when the testator, subsequent to the will's execution, changed the beneficiary of the policy to his wife and depleted the funds of the policy by borrowing against them.²⁶ The court reached its decision by finding that the provision constituted a specific legacy²⁷ and then applying what it termed the form and substance test of ademption.²⁸ The court held

²⁴The *McAdams* court stated:

It is scarcely necessary to state that the observations of the court in the [*McClure*] decisions . . . are to be limited to the facts before it, and that in such a case as this, in which the interest or right of the son was fixed by law, the theory that conveyances of bare expectancies are in fraud of the bounty of the ancestor can have no application. It is doubtless true that attempted conveyances of bare expectancies by presumptive heirs are narrowly watched by courts of equity, at least when it is necessary to invoke their jurisdiction, and that in such cases the burden is on the assignee to repel the inference of constructive fraud, yet it cannot be affirmed that such courts look with disfavor upon what are construed as executory contracts for the transfer of future interests

Id. at 527, 82 N.E. at 1060-61.

²⁵380 N.E.2d 601 (Ind. Ct. App. 1978).

²⁶*Id.* at 602.

²⁷*Id.* If a will names the beneficiary, courts generally hold that the devise is a specific legacy. *Carter v. First Nat'l Bank*, 237 Ala. 47, 185 So. 361 (1938); *Prudential Ins. Co. v. Newsom*, 408 S.W.2d 161 (Mo. App. 1966); *In re Huff's Estate*, 52 Misc. 2d 93, 274 N.Y.S.2d 996 (Sur. Ct. 1966); *Minnesota Life Ins. Co. v. Allen*, 55 Tenn. App. 405, 401 S.W.2d 589 (1965).

²⁸380 N.E.2d at 603. The courts have used two basic tests to determine whether an ademption has occurred. Under the discarded "Ancient Rule," the testator's intent controlled the application of the doctrine of ademption. Extrinsic evidence could be admitted to show intent. The identity theory of ademption simply involves the question whether the property is found in the testator's estate at his death. The *Weaver* court applied the form and substance test, which it termed a third test of ademption. Most courts, however, consider the form and substance test as an escape device to avoid the harsh results achieved through application of the identity theory. Under the form and substance test, only substantial changes cause an ademption. The problem with the form and substance test is that the distinction between formal and substantial changes is often imprecise. See T. ATKINSON, *HANDBOOK ON THE LAW OF WILLS* § 134 (2d ed. 1953).

Recently, some commentators have indicated that the identity theory, even with its exceptions, is too harsh, and have recommended that the testator's intent be considered, but not be determinative, in deciding whether a devise is adeemed. Note, *Ademption in New York: The Identity Doctrine and the Need for Complete Abrogation by Legislation*, 25 SYRACUSE L. REV. 978, 1004 (1974), or that the intent theory be readopted, Paulus, *Ademption by Extinction: Smiting Lord Thurlow's Ghost*, 2 TEX. TECH. L. REV. 195, 228 (1971).

that because the bequest had been changed in substance and not merely in form, it was adeemed.²⁹

The court's analysis is seriously flawed by its assumption that a testamentary bequest was created. The language of the will stated: "During my lifetime, I have arranged my insurance program so my daughter, Nancy Lee Schultz is beneficiary on part of my life insurance, and it is my will that the proceeds from this life insurance policy shall be her share in my said estate."³⁰ The provision was nontestamentary in character, because instead of naming the testator's daughter as beneficiary of the insurance proceeds, it simply acknowledged the testator's prior naming of his daughter as beneficiary.³¹ Thus, the provision amounted to a recognition of an inter vivos gift.

Despite its erroneous characterization of the provision at issue as testamentary, *Weaver* reaffirmed Indiana's adoption of the identity theory of ademption incorporating the form and substance test. In *Pepka v. Branch*,³² the second district court of appeals overturned the "Ancient Rule" (intent theory) of ademption by extinction which the first district court of appeals had used only four years earlier in *In re Estate of Brown v. Schaffer*.³³ *Weaver*, a decision by the first district court of appeals, should officially bury *Brown* and eliminate what one commentator has called "the somewhat confusing and conflicting approaches taken by the Indiana Courts of Appeal"³⁴ in ademption cases. Nevertheless, Indiana's adoption of the identity theory incorporating the form and substance test comes at a time when other states are shifting back to some form of intent-based theory of ademption.³⁵

3. *Joint Wills.*—a. *Contract not to revoke a joint will.*—In *In re Estate of Maloney v. Carsten*,³⁶ the court of appeals dealt with the issue of the effect of a subsequent will executed by the surviving

²⁹380 N.E.2d at 603.

³⁰*Id.* at 602.

³¹1 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 5.4 (1960). A description of a past act of the testator is likely not to be testamentary in nature. T. ATKINSON, *supra* note 28, at § 81.

³²155 Ind. App. 637, 294 N.E.2d 141 (1973). For a discussion of *Pepka v. Branch*, see *Probate and Trusts, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 212, 218-20 (1973).

³³145 Ind. App. 591, 252 N.E.2d 142 (1969).

³⁴Note, *Ademption by Extinction in Indiana*, 11 IND. L. REV. 849 (1978). *Pepka* was decided by the second district court of appeals, and although the case purported to overrule the first district case of *Brown*, the author remained unconvinced that the first district would accept the demise of the intent theory. *Id.* at 869-70.

³⁵See, e.g., KY. REV. STAT. § 394.360 (1972); WIS. STAT. ANN. § 853.35 (1971).

³⁶381 N.E.2d 1263 (Ind. Ct. App. 1978).

spouse on a prior inconsistent joint will executed by the wife and the now deceased husband.³⁷

Correctly noting that a joint will is equally subject to the rules of revocation,³⁸ the court stated that a subsequent inconsistent instrument had revoked the will.³⁹ Nevertheless, an accompanying agreement not to revoke a joint will may be enforced in equity by the imposition of a constructive trust "in favor of the beneficiaries under the joint will."⁴⁰ Although the court did not find an express agreement not to revoke, the court found an implied agreement by examining the stated purposes of the will⁴¹ and the disposition of property under the will.⁴² The court explained that the implied agreement fulfilled the "intentions of the testators and the clearly-stated purpose for which the will was executed."⁴³ Based upon this implied agreement, the court created a constructive trust in favor of the beneficiaries of the joint will.⁴⁴ A court will rarely imply an agreement when the court's finding depends entirely on the terms of the joint will.⁴⁵

b. *Lapse*.—*Maloney* also presented an issue of lapse. The claimants were heirs of two beneficiaries who had survived the husband but predeceased the wife. The claimants sought to enforce the agreement not to revoke the joint will.⁴⁶

Concluding that the Indiana anti-lapse statute⁴⁷ was inapplicable because the beneficiaries were not descendants of the testator, the

³⁷*Id.* at 1267.

³⁸*Id.* See *Mountz v. Brown*, 119 Ind. App. 38, 45, 81 N.E.2d 374, 377 (1948) (joint will to take effect after death of both husband and wife); *Manrow v. Deveney*, 109 Ind. App. 264, 267, 33 N.E.2d 371, 372 (1941) (joint and mutual will).

³⁹The court's brief discussion of the subsequent will reveals only that the instrument disposed of the widow's estate in a manner substantially different from that set forth in the original will executed by her in 1951. 381 N.E.2d at 1267. Presumably, the subsequent will revoked the joint will by implied revocation. The court did not consider the possibility that provisions in the first will consistent with provisions in the second will were not revoked. See generally Annot., 59 A.L.R.2d 11 (1958).

⁴⁰381 N.E.2d at 1267 (citing *Sample v. Butler Univ.*, 211 Ind. 122, 4 N.E.2d 545 (1936)); *Lawrence v. Ashba*, 115 Ind. App. 485, 59 N.E.2d 568 (1945). See Costigan, *Constructive Trusts Based on Promises Made to Secure Bequests, Devises, or Intestate Succession*, 28 HARV. L. REV. 237, 250 (1915).

⁴¹The stated purposes of the will were "to protect each other in the disposition of our property [and] to make final disposition thereof upon the death of the survivor of us." 381 N.E.2d at 1267.

⁴²The property was to be divided equally upon the death of the survivor "with one-half going to the family of each." *Id.*

⁴³*Id.*

⁴⁴*Id.* at 1267-68.

⁴⁵*Janes v. Rogers*, 224 Ark. 116, 271 S.W.2d 930 (1954); *Thompson v. Boyd*, 217 Cal. App. 2d 365, 32 Cal. Rptr. 513 (1963).

⁴⁶381 N.E.2d at 1268.

⁴⁷IND. CODE § 29-1-6-1(g)(2) (1976).

court applied a common law exception to the doctrine of lapse and held that the doctrine "is not applicable where there is a 'contract or agreement controlling and binding upon the testator in respect to such legacy or devise.'" ⁴⁸ The court explained that the rationale of the lapse doctrine "is that a will by its very nature is ambulatory and does not become operative until the death of the testator and until that event, a legacy has never vested." ⁴⁹ The court stated that this rationale could not apply to contracts binding the testator to devise the property, ⁵⁰ and allowed the heirs of the deceased beneficiaries to enforce the agreement not to revoke the joint will. ⁵¹

The court properly refused to apply the doctrine of lapse. As the court recognized, Indiana law already allows a third-party beneficiary to enforce a promise made for his benefit if someone acts upon or accepts that promise. ⁵² The court should have resolved the single issue whether the beneficiaries' rights under the contract could be distributed to an heir or devisee of the beneficiaries. ⁵³ Under ordinary contract rules, the beneficiary has the right to assign his contract rights to an heir or devisee. ⁵⁴

c. After-acquired property.—The third issue raised by *Maloney*, concerning joint wills, was whether property acquired by the survivor after the death of the co-testator was subject to the contract not to revoke a joint will. By statute, property acquired by the testator after the execution of the will passes "as if title thereto was vested in him at the time of making the will." ⁵⁵ Recognizing that the after-acquired property would pass according to statute "had the joint will been probated," the court decided that a different distribution should not result through enforcement of the contract not to revoke the joint will. ⁵⁶

d. Jointly held property.—The fourth issue raised by *Maloney* was whether jointly held property was subject to the contract not to revoke a joint will. The executor of the widow's estate argued that because the widow "took title to [jointly held] property by operation of law and not as a result of the will, she was not bound to dispose of the property pursuant to the terms of the will." ⁵⁷ The court held

⁴⁸381 N.E.2d at 1268 (quoting *Ballard v. Camplin*, 161 Ind. 16, 67 N.E. 505 (1903)).

⁴⁹381 N.E.2d at 1268 (citing *Farmers & Merchants State Bank v. Feltis*, 150 Ind. App. 284, 276 N.E.2d 204 (1971)).

⁵⁰381 N.E.2d at 1268.

⁵¹*Id.* at 1269.

⁵²*Blackard v. Monarch's Mfrs. & Distrib., Inc.*, 131 Ind. App. 514, 522, 169 N.E.2d 735, 739 (1960).

⁵³*See Doyle v. Fischer*, 183 Wis. 599, 198 N.W. 763 (1924).

⁵⁴A. CORBIN, CORBIN ON CONTRACTS § 867 (1952).

⁵⁵381 N.E.2d at 1269 (quoting IND. CODE § 29-1-6-1(a) (1976)).

⁵⁶381 N.E.2d at 1269.

⁵⁷*Id.*

that the joint will contemplated the distribution of the jointly held property; thus, the jointly held property was subject to the contract not to revoke the joint will.⁵⁸

4. *Constructive Trusts*.—In *Givens v. Rose*,⁵⁹ the Indiana Court of Appeals reversed a lower court decision and imposed a constructive trust on misappropriated funds belonging to the estate of a deceased incompetent.⁶⁰ Mary Ellen Givens had been a total incompetent since birth. During the last sixteen years of her life,

⁵⁸*Id.*

⁵⁹383 N.E.2d 448 (Ind. Ct. App. 1978).

⁶⁰*Id.* at 456. Although *Givens* limited the grounds for raising a constructive trust, the restriction appears to have been unintentional. *Westphal v. Heckman*, 185 Ind. 88, 113 N.E. 299 (1916), is the basic authority for the imposition of constructive trusts in Indiana. The *Westphal* court stated:

A constructive trust arises in cases where the transaction involved is tainted by fraud, actual or *constructive*. In such cases, in order to prevent the wrongdoer from reaping a benefit from his fraud, a court of equity will construct a trust such as equity and good conscience requires in order to do justice to the parties affected by the fraudulent transaction.

Id. at 97, 113 N.E. at 302 (citations omitted) (emphasis added).

The court in *Givens* apparently limited the definition of constructive fraud to "a breach of duty arising out of a confidential or fiduciary relationship which necessitates the presumption that fraud be inferred." 383 N.E.2d at 453.

Although Indiana has not precisely defined constructive fraud, recent cases advance the concept of "fraud that arises by operation of law from conduct which, if sanctioned by the law, would secure an unconscionable advantage." *Lawshe v. Glen Park Lumber Co., Inc.*, 375 N.E.2d 275, 278 (Ind. Ct. App. 1978) (citation omitted). See *Koenig v. Leas*, 240 Ind. 449, 165 N.E.2d 134 (1960); *Brown v. Brown*, 235 Ind. 563, 135 N.E.2d 614 (1956); *Beecher v. City of Terre Haute*, 235 Ind. 180, 132 N.E.2d 141 (1956); *Leader Publishing Co. v. Grant Trust & Savings Co.*, 182 Ind. 651, 108 N.E. 121 (1915); *Hoosier Ins. Co. v. Ogle*, 150 Ind. App. 590, 276 N.E.2d 876 (1971); *Smart & Perry Ford Sales, Inc. v. Weaver*, 149 Ind. App. 693, 274 N.E.2d 718 (1971); *Ballard v. Drake's Estate*, 103 Ind. App. 143, 5 N.E.2d 671 (1937).

A second definition of constructive fraud favored by the Indiana courts originated in *Daly v. Showers*, 104 Ind. App. 480, 8 N.E.2d 139 (1937), in which the court stated: "'Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feisor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence or to injure public interests.'" *Id.* at 486, 8 N.E.2d at 14 (quoting 26 C.J. *Fraud* § 3, at 1061 (1921)). See *Koenig v. Leas*, 240 Ind. 449, 165 N.E.2d 134 (1960); *Brown v. Brown*, 235 Ind. 563, 135 N.E.2d 614 (1956); *Budd v. Board of County Comm'rs*, 216 Ind. 35, 22 N.E.2d 973 (1939); *Coffey v. Wininger*, 156 Ind. App. 233, 296 N.E.2d 154 (1973); *McKinley v. Overbay*, 132 Ind. App. 272, 177 N.E.2d 389 (1961).

Therefore, constructive fraud apparently has a broader definition than the one suggested by *Givens*. The court's erroneous statement of the grounds for raising a constructive trust appears to have been based on its reliance on *Hunter v. Hunter*, 152 Ind. App. 365, 283 N.E.2d 775 (1972), cited in *Givens v. Rose*, 383 N.E.2d at 453. *Hunter* was another case in which the court narrowly defined constructive fraud as arising out of a fiduciary relationship. However, because the grounds for raising a constructive trust were narrowed without comment in both *Hunter* and *Givens*, the revision appears to have been unintentional.

Mary received social security payments through her representative payees—her father, mother, and sister Betty. Her father used part of the funds to care for Mary and, pursuant to social security regulations,⁶¹ deposited the remainder in joint certificates of deposit in the name of Mary and either her father, mother, or sister Betty.⁶² Due to the death of Mary's father, the placement of her mother in a nursing home, and the illness of her sister Betty, most of the funds were transferred to a joint checking account in the names of Mary and her sister, Pauline Rose. Following Mary's death in 1973, Pauline paid the expenses of administration out of the account. Subsequently, Pauline withdrew \$8,500 of the remaining \$8,866.69 for her own benefit, and the administrator of Mary's estate brought an action to recover the funds. The appellate court, affirming the trial court, found for the estate and imposed a constructive trust on the \$8,500.⁶³

In discussing the grounds for imposing a constructive trust, the court recognized that such a trust is a creation of equity, designed to remedy the wrongful or fraudulent acquisition of one's property by another.⁶⁴ According to the court, constructive trusts are imposed in Indiana only if actual fraud exists or "there exists a breach of duty arising out of a confidential or fiduciary relationship which necessitates the presumption that fraud be inferred."⁶⁵ The court noted that such a breach of duty is presumed when a party in a superior position deals with another "in such a way as to sustain a substantial advantage."⁶⁶ Proof of a confidential relationship

⁶¹20 C.F.R. § 404.1605 (1979) states in relevant part:

Payments certified to a relative or other person on behalf of a beneficiary which are not needed for the current maintenance of the beneficiary . . . shall be conserved or invested on the beneficiary's behalf. . . . Surplus funds deposited in an interest—or dividend—bearing account in a bank or trust company, in a savings and loan association, or in a credit union, must be in a form of account which clearly shows that the representative payee has only a fiduciary, and not a personal, interest in the funds.

⁶²383 N.E.2d at 451.

⁶³*Id.* at 456. One certificate of deposit still was held in the name of Betty Bailey and Mary Givens at the death of Mary Givens in 1973; the heirs of Betty transferred the certificate to the joint checking account following her death later in 1973. *Id.* at 453-54.

⁶⁴*Id.* at 452. See *Koenig v. Leas*, 240 Ind. 449, 165 N.E.2d 134 (1960); *Brown v. Brown*, 235 Ind. 563, 135 N.E.2d 614 (1956); *Hunter v. Hunter*, 152 Ind. App. 365, 283 N.E.2d 775 (1972); *McKinley v. Overbay*, 132 Ind. App. 272, 177 N.E.2d 44 (1961). See generally G. BOGERT & G. BOGERT, *HANDBOOK OF THE LAW OF TRUSTS* § 77 (1973).

⁶⁵383 N.E.2d at 453. The stated grounds are more restrictive than those specified in many Indiana cases. See note 60 *supra*.

⁶⁶*Id.* (quoting *Hunter v. Hunter*, 152 Ind. App. 365, 372, 283 N.E.2d 775, 780 (1972)).

"establishes *prima facie* that the dominant party . . . occupies a position of trust and confidence which he must not abuse.'" ⁶⁷

In *Givens*, the court raised a constructive trust by reason of the confidential relationship which existed between Mary and her sister Pauline Rose, who held the funds in joint tenancy with Mary. Because of the confidential relationship and the fact that Pauline had failed to prove "good faith," imposition of a constructive trust was deemed appropriate. ⁶⁸

5. *Intestate Succession*.—A recent decision by the United States Supreme Court ended a two-year period during which the constitutionality of Indiana's statutory provision regarding inheritance rights of illegitimate children has been in question. ⁶⁹ In *Lalli v. Lalli*, ⁷⁰ the Court upheld a New York statute which permitted an illegitimate child to inherit from his father only upon a judicial finding of paternity within the lifetime of the father and within a period encompassing the pregnancy of the mother and a two-year period after the birth of the child. ⁷¹ The Court distinguished the New York statute from an Illinois statute held violative of the equal protection clause ⁷² in *Trimble v. Gordon*. ⁷³ The discriminatory aspect of the Illinois law was its requirement that the parents marry; the New York statute did not contain a similar provision. ⁷⁴ The Court held that New York's interest in insuring the orderly disposition of property upon death justified its requirement of proof of paternity against a contention that the requirement constituted a denial of equal protection. ⁷⁵

Because the Indiana statute, ⁷⁶ permitting proof of paternity to be made in a court proceeding at any point during the father's life, is broader than the New York statute upheld in *Lalli*, the Indiana statute undoubtedly is constitutional.

6. *Expenses During Administration of Estate*.—In *In re Estate of Smith*, ⁷⁷ the Indiana Court of Appeals held that an executor could not charge against the distributive share of the widow mortgage payments made on real estate during the period of administration of

⁶⁷*Id.*

⁶⁸*Id.* at 456.

⁶⁹See Falender, *Trusts and Decedents' Estates, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 330, 334-37 (1978).

⁷⁰439 U.S. 259 (1978).

⁷¹*Id.* at 261 n.2.

⁷²U.S. CONST. amend. XIV, § 1.

⁷³430 U.S. 762 (1977).

⁷⁴439 U.S. at 268.

⁷⁵*Id.* at 275-76.

⁷⁶IND. CODE § 29-1-2-7 (1976).

⁷⁷388 N.E.2d 287 (Ind. Ct. App. 1979).

the decedent-mortgagor's estate.⁷⁸ Although the widow took the real estate subject to the mortgage, she was not personally liable for payment of the remaining debt, because only the decedent had executed the note and mortgage. The court noted that the distributive share of the widow can be charged if she is liable on an obligation or there is a prior lien on the estate which she is to receive.⁷⁹

In this case, the decedent had provided for payment of the mortgage by assigning to the mortgagee-executor part of the rental payments from other property. Thus, the court held that "the payments made during the administration of the estate were a proper liability of the estate which collected the rents that were the subject of the assignment."⁸⁰

The court also observed that the real estate subject to the assignment had been devised to other beneficiaries. By analogy to the statute,⁸¹ the court held that the mortgage payments had to be met by the assigned rent, because the removal of the encumbrance on the real estate subject to the assignment would increase the share of the distributees entitled to the encumbered asset.⁸²

7. *Effect of Amendment to Statute Specifying Time Allowed for Filing Claims on Filing Election to Take Against the Will.*—In *In re Estate of Wegmiller*,⁸³ the court of appeals considered the effect of a legislative reduction in the time permitted for filing of claims against a decedent's estate with respect to the surviving spouse's election to take against the decedent's will. An election to take against the will must be filed "not later than ten [10] days after the expiration of time limited for the filing of claims" against the estate.⁸⁴ The legislature had shortened the period for the filing of claims from six months⁸⁵ to five months, effective January 1, 1976.⁸⁶ In the present case, notice for filing of claims was published on October 4, 1975, and the spouse filed his election to take against the will on April 12, 1976—after five months and ten days, but before six months and ten days.

The court held that the relevant statutes created substantive rights and "impose[d] a condition precedent to asserting a statutory right"; they did not operate as statutes of limitation, which bar only the remedy.⁸⁷ Because the court regarded the statutes as substan-

⁷⁸*Id.* at 290.

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹IND. CODE § 29-1-14-20 (1976).

⁸²388 N.E.2d at 290.

⁸³377 N.E.2d 664 (Ind. Ct. App. 1978).

⁸⁴IND. CODE § 29-1-3-2 (1976).

⁸⁵*See id.* § 29-1-14-1 (1971) (amended 1976).

⁸⁶*Id.* § 29-1-14-1 (1976).

⁸⁷377 N.E.2d at 666.

tive in nature, it found that an attempted retroactive application "would impair vested rights or violate some constitutional guaranty [sic]" ⁸⁸ Thus, the spouse's election had been timely filed.

B. Statutory Developments

The legislature amended several sections of the probate⁸⁹ and trust⁹⁰ codes during the survey period. The first, and most significant, legislative change was the creation of a new type of guardianship. The guardian is called a "limited guardian" and may "assist an incompetent in managing a *portion* of his property or his affairs."⁹¹ A limited guardian may be appointed for an incompetent's person or estate or both if the court finds that appointment is in the incompetent's best interest. The powers and duties of a limited guardian are confined to those specifically stated in the order of appointment.⁹²

A second amendment lengthened the period for a filing a renunciation of an interest from five months⁹³ to nine months after the death of the decedent or the time of closing of the estate, whichever occurs first.⁹⁴ If, however, the taker of the interest has not been ascertained within the above-described period, the renunciation must be filed within nine months after the event by which the taker is ascertained or the time of closing of the estate, whichever occurs first.⁹⁵

Third, the legislature provided a method of allowing "an interested person" to acquire information concerning the estate from the personal representative.⁹⁶ The statute requires that the interested person file a petition, limits the disclosure to "relevant materials," and authorizes the court to impose conditions on disclosure.⁹⁷

Fourth, the legislature added a provision which permits a guardian appointed solely because of the ward's minority to establish a trust for the ward's benefit.⁹⁸ The trust may be created "either with

⁸⁸*Id.*

⁸⁹IND. CODE §§ 29-1-1-1 to -2-18-2 (1976 & Supp. 1979).

⁹⁰*Id.* §§ 30-1-1-1 to -4-6-13.

⁹¹*Id.* § 29-1-18-1(f) (Supp. 1979) (emphasis added). The term "incompetent" is defined at *id.* § 29-1-18-1(c).

⁹²*Id.* § 29-1-18-21(c).

⁹³*Id.* § 29-1-6-4(b) (1976) (amended 1979).

⁹⁴*Id.* § 29-1-6-4(b) (Supp. 1979).

⁹⁵*Id.*

⁹⁶*Id.* § 29-1-7-6(b). The provision states: "Upon petition by an interested person, the court having jurisdiction over the estate may, in its discretion, under such terms and conditions as the court considers appropriate, order the personal representative to provide that interested person with relevant materials specified in the court's order."

⁹⁷*Id.*

⁹⁸*Id.* § 29-1-18-28(c).

consent of the ward or after notice to the ward and hearing upon petition to and approval by the court having jurisdiction over the guardianship.”⁹⁹ In deciding whether to establish a trust, the court must consider the ward’s ability to handle “his own business affairs relating to the assets being derived from the guardianship.”¹⁰⁰ The trust is subject to such terms and conditions as the court may establish and must end by the time the ward reaches twenty-one years of age.¹⁰¹

Fifth, the legislature broadened the scope of section 30-4-2-13, the “beneficiary-managed” trust exception¹⁰² to the Indiana equivalent of the Statute of Uses.¹⁰³ Under the prior version of section 30-4-2-13,¹⁰⁴ the Statute of Uses did not apply to defeat the trustee’s title to a passive trust if the trust consisted exclusively of real property. The new version, however, prevents title from vesting automatically in the beneficiary even though real property constitutes only part of the trust corpus.¹⁰⁵

Sixth, the legislature modified slightly the provisions allowing establishment of a funeral trust. The legislature added a new element to those already necessary for creating a funeral trust: such a trust must “be either a time deposit, or account, or certificate of deposit in a financial institution, in the names of the settlor and the beneficiary payable on death to the survivor, or name the designated institution as sole trustee.”¹⁰⁶ In addition, such a trust may now be held in a credit union.¹⁰⁷

Finally, the legislature made two minor modifications in the chapter dealing with non-probate transfers.¹⁰⁸ The legislature explained that the definition of the term “party” does not encompass “a person who is merely authorized to make a request as the agent

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.*

¹⁰²*Id.* § 30-4-2-13. A passive trust is not executed such that title vests directly in the beneficiary if:

(a) The beneficiary has the power to manage the trust property, including the power to direct the trustee to sell the property; and

(b) The trustee may sell the trust property only on direction by the beneficiary or other person or may sell it after a period of time stipulated in the terms of the trust in the absence of a direction. . . .

Id.

¹⁰³*Id.* § 20-4-2-9 (1976). Based upon the Statute of Uses, if a trust is passive, that is, if the trustee has no duties under the trust, title to the trust property will vest in the beneficiary. G. BOGERT & G. BOGERT, *supra* note 64, § 46.

¹⁰⁴IND. CODE § 30-4-2-13 (1976) (amended 1979).

¹⁰⁵*Id.* § 30-4-2-13 (Supp. 1979).

¹⁰⁶*Id.* § 30-2-9-1.5(b)(6).

¹⁰⁷*Id.* § 30-2-9-1(b)(5).

¹⁰⁸*Id.* §§ 32-4-1.5-1 to -15 (1976 & Supp. 1979).

of another."¹⁰⁹ The legislature also made it clear that an account with a financial institution is not subject to the personal property provisions of section 32-4-1.5-15.¹¹⁰

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¹⁰⁹*Id.* § 32-4-1.5-1(7) (Supp. 1979).

¹¹⁰*Id.* § 32-4-1.5-15.

XVIII. Workmen's Compensation

Stephen E. Arthur*

A. Arising out of and in the Course of Employment

The Indiana Workmen's Compensation Act¹ imposes two statutory prerequisites to coverage of employment-related accidents.² First, the injured worker must prove the existence of an employer-employee relationship.³ Independent contractors are not employees under the workmen's compensation scheme.⁴ Second, the accident must "arise out of" and "in the course of" that employment relationship.⁵ When this direct causal link between injury and employment is proven,⁶ the employee becomes entitled to workmen's compensation, the exclusive remedy against the employer.⁷ Several

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¹IND. CODE §§ 22-3-2-1 to -6-3 (1976 & Supp. 1979).

²*Id.* § 22-3-2-2 (1976) provides in part: "[E]very employer and every employee, except as herein stated, shall be required to comply with the provisions of this law, respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby." See generally Larson, *The Legal Aspects of Causation in Workmen's Compensation*, 8 RUTGERS L. REV. 423 (1954); Malone, *The Limits of Coverage in Workmen's Compensation—The Dual Requirement Reappraised*, 51 N.C.L. REV. 705 (1973).

³See 1B A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 43.00-.54 (1979); B. SMALL, *WORKMEN'S COMPENSATION LAW OF INDIANA* § 4.1 (1950); Note, *The Test for the Employment Relationship Under Workmen's Compensation*, 1 U.C.L.A.—ALAS. L. REV. 40 (1971). As a general rule, the test for determining whether an employment relationship exists is the employer's "right to control" the worker's conduct, as distinguished from the right merely to require certain results in conformity with a contract. Compare *Edelston v. Builders & Remodelers, Inc.*, 304 Minn. 550, 550-51, 229 N.W.2d 24, 25 (1975), wherein the court considered the following factors in determining the existence of an employment relationship: (1) The right to control the means and manner of performance, (2) the mode of payment, (3) the furnishing of materials or tools, (4) the control of the work site, and (5) the right to discharge, with RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958), which enumerates several factors relevant to a determination of the employment status.

⁴*Meek v. Julian*, 219 Ind. 83, 36 N.E.2d 854 (1941); B. SMALL, *supra* note 2, § 4.2 (1950 & Supp. 1976).

⁵1 A. LARSON, *supra* note 3, §§ 6.00-19.63 (1978 & Supp. 1979); Comment, "Arising Out of and in the Course of Employment" in *Workmen's Compensation*, 28 TENN. L. REV. 367 (1961). See Malone, *supra* note 2.

⁶The burden of proving that the accident arose out of and in the course of employment is upon the injured claimant. *Gill v. James A. Gill & Sons*, 130 Ind. App. 1, 159 N.E.2d 734 (1959); B. SMALL, *supra* note 3, § 12.6, at 384-87.

⁷IND. CODE § 22-3-2-6 (1976) provides:

The rights and remedies herein granted to an employee subject to this act . . . on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives,

cases decided during this survey period have focused on this causal prerequisite to coverage under the Workmen's Compensation Act.

1. *The Pre-Existing Injury Doctrine.*—In *Parks v. Sheller-Globe Corp.*,⁸ the Indiana Court of Appeals reiterated the rule that a pre-existing disease or infirmity will not bar a claim for the full extent of a disability which is caused by a compensable industrial accident.⁹ In *Parks*, the employee sustained a compression fracture of a vertebra, which was compensable under the Workmen's Compensation Act. The industrial board found that the injury activated a pre-existing dormant form of plasma cell leukemia. The board awarded only temporary total disability despite evidence that Parks was permanently disabled and unable to return to work.¹⁰ The board concluded that in the absence of Parks' latent condition, the injury might have healed, enabling Parks to return to regular employment within six months. The board further determined that a "normal individual" probably would not have sustained a compression fracture as a result of the accident.

The court of appeals reversed the board¹¹ and held that under the Workmen's Compensation Act an employee is entitled to benefits commensurate with the full extent of disability—including that portion of the injury which resulted from the aggravation or causation of a latent, pre-existing condition.¹² The court stated that "[t]he liability of an employer . . . is not limited to injuries which physically and mentally perfect employees would sustain in similar accidents; rather, he is bound to take employees as he finds them."¹³ The court indicated that a pre-existing condition will limit an employer's liability only when that condition is an impairment or disability in and of itself.¹⁴

2. *Refusal to Submit to Medical Care.*—In *Childers v. Central Teaming & Construction Co.*,¹⁵ the Indiana Court of Appeals determined the extent to which an injured employee would be entitled to compensation for a disability caused, in part, by the employee's refusal to submit to medical treatment.¹⁶ Childers, a forty-six year

dependents or next of kin, at common law or otherwise, on account of such injury or death.

⁸380 N.E.2d 110 (Ind. Ct. App. 1978).

⁹*Id.* at 112.

¹⁰For a discussion of the difference between permanent total disability and temporary total disability, see *Covarubias v. Decatur Casting Div. of Hamilton Allied Corp.*, 358 N.E.2d 174 (Ind. Ct. App. 1976).

¹¹380 N.E.2d at 112.

¹²*Id.*

¹³*Id.* at 111-12.

¹⁴*Id.* at 112.

¹⁵384 N.E.2d 1116 (Ind. Ct. App. 1979).

¹⁶IND. CODE § 22-3-3-4 (Supp. 1979) provides in part:

[T]he employer may continue to furnish a physician or surgeon and other

old employee of Central Teaming, applied to the industrial board for an adjustment of a prior compensation award. A single hearing member denied the employer's petition that Childers' application be vacated based upon a demand that he submit to proffered medical treatment and awarded Childers eighty percent permanent partial impairment. The full industrial board found that Childers was only entitled to thirty percent permanent partial impairment because part of his disability had been caused by a refusal to undergo an operation which was reasonably calculated to improve his condition. Childers' only reason for refusing to undergo surgery was fear generated by the physician's refusal to make an absolute guarantee that Childers' condition would improve as a result of the operation.

The court of appeals affirmed the industrial board's reduction to thirty percent permanent partial impairment¹⁷ and enunciated a general rule that not every refusal to undergo medical treatment mandates that compensation benefits be reduced or eliminated.¹⁸ Rather, a refusal to submit to treatment will bar compensation only when the refusal is unreasonable in light of the surrounding circumstances,¹⁹ thus causing some part of the disability which is attributable to employee conduct unrelated to a risk incidental to the employment relationship itself.²⁰ That increment of disability caused by a refusal of medical care does not arise out of and in the course of the employment and, therefore, is not compensable under the workmen's compensation scheme. As noted by the court of appeals:

The foregoing, of course, does not mean that Childers is being forced to undergo a recommended medical procedure. That choice is still his. However, the provisions for workmen's compensation relieve an employer from the

medical services and supplies and the industrial board may . . . on a proper application of either party, require that treatment by such physician and other medical services and supplies be furnished by and on behalf of the employer as the industrial board may deem necessary to limit or reduce the amount and extent of such impairment. The refusal of the employee to accept such services and supplies, when so provided by or on behalf of the employer, shall bar the employee from all compensation otherwise payable during the period of such refusal and his right to prosecute any proceeding under this article . . . shall be suspended and abated until such refusal ceases; no compensation for permanent total impairment, permanent partial impairment, permanent disfigurement or death shall be paid or payable for that part or portion of such impairment, disfigurement or death which is the result of the failure of such employee to accept such treatment, services and supplies.

¹⁷384 N.E.2d at 1118.

¹⁸*Id.* at 1117-18.

¹⁹*Id.* at 1118.

²⁰1 A. LARSON, *supra* note 3, § 13.22 (1978); B. SMALL, *supra* note 3, § 11.4 (1950 & Supp. 1976).

burden of paying compensation for that portion of his impairment which exists because he has unreasonably refused the proffered treatment.²¹

The court of appeals found the following factors sufficient to support the board's determination that Childers' refusal to undergo the surgery was unreasonable:²² (1) For the existing injury, reasonable treatment was the operation; (2) the estimated chances of success were good; (3) if unsuccessful, Childers' condition would not be worsened; (4) the surgery involved no unusual risk or extraordinary pain; (5) the operation recommended was the "textbook" treatment of Childers' condition; (6) the long term benefits and cure likely to accrue were good; (7) Childers was otherwise healthy and likely to respond favorably to the surgery; and (8) the physician was qualified and had prior experience in performing this type of operation.²³ These factors, when weighed against Childers' unfounded fear of the operation,²⁴ led the court to affirm the industrial board's ruling that Central Teaming was not liable for that portion of the total disability which was caused by Childers' rejection of the surgery.²⁵

3. *Horseplay*.—During the survey period, the Indiana Supreme Court, in a three-two decision, denied transfer in *Pepka Spring Co. v. Jones*.²⁶ In that case, Jones had initiated "spring throwing" at a fellow employee. After throwing the spring, Jones left the immediate area to get a drink of water. He returned approximately three to four minutes later and resumed normal work-related duties. Shortly thereafter, he was struck in the eye with a spring thrown by the same fellow employee.

The issue presented on appeal was whether Jones' claim for compensation was barred by his own horseplay activity. The general rule is that injury resulting from horseplay activity is not causally linked to a risk incidental to the employment relationship but arises from a personal frolic or abandonment of that relationship by the

²¹384 N.E.2d at 1118.

²²Professor Larson enumerates several factors which bear upon the issue of reasonableness: (1) the claimant's age, (2) the claimant's physical condition, (3) the claimant's previous surgical experience, (4) the ratio of deaths from the operation, and (5) the percentage of cures. 1 A. LARSON, *supra* note 3, §§ 13.22, at 3-419 to -429 (1978). Larson further states that "[t]he question whether refusal of treatment should be a bar to compensation turns on a determination whether the refusal is reasonable. Reasonableness in turn resolves itself into a weighing of the probability of the treatment's successfully reducing the disability by a significant amount, against the risk of the treatment to the claimant." *Id.* at 3-398.

²³384 N.E.2d at 1117.

²⁴*Id.*

²⁵*Id.* at 1118.

²⁶378 N.E.2d 857 (Ind. 1978).

worker.²⁷ Two exceptions exist to this rule: (1) When injury befalls an innocent victim of horseplay,²⁸ and (2) when the employer has knowledge and acquiesces in the horseplay.²⁹

The industrial board ruled that Jones had withdrawn from horseplay activity at the time of injury and therefore was entitled to compensation. A majority of the Indiana Court of Appeals³⁰ and the Indiana Supreme Court³¹ agreed with that ruling. The majority focused on whether Jones had in fact abandoned the horseplay activity and returned to his employer's work. The focus was not on the time element between horseplay and the return to work, but rather whether the employee intended to and effectuated a return to that work.³² Because it could be inferred reasonably from the facts that Jones had returned to a work-related activity, the board's grant of compensation was affirmed.³³

Two justices of the Indiana Supreme Court dissented to the denial of transfer, arguing that "[t]he question on review is thus not one of fact, as it was seen to be by the Court of Appeals in this case, but one of law."³⁴ The dissent indicated that Jones' attempt to abandon the frolic and return to work did not constitute an intervening factor which would break the chain of cause and effect initiated by Jones' original action of throwing the spring.³⁵ The retaliation was, in the dissent's view, a foreseeable response and part of the ongoing horseplay and therefore not terminated by Jones' return to work.³⁶

²⁷*Block v. Fruehauf Trailer Div.*, 146 Ind. App. 70, 252 N.E.2d 612 (1969), wherein the court stated: "Once the connection between the employment and the 'horseplay' conduct becomes so tenuous that there is no apparent causal factor, to permit compensation would be to disregard even the most liberal boundaries of the limitation, 'arising out of and in the course of the employment.'" *Id.* at 74, 252 N.E.2d at 615. *See also* *Lincoln v. Whirlpool Corp.*, 151 Ind. App. 190, 279 N.E.2d 596 (1972).

²⁸146 Ind. App. at 73, 252 N.E.2d at 615.

²⁹*Id.*

³⁰371 N.E.2d 389 (Ind. Ct. App. 1978), *discussed in* Price, *Workmen's Compensation, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 334 (1979).

³¹378 N.E.2d at 858.

³²371 N.E.2d at 391, wherein the court stated:

The Board's finding which recited that Jones had "returned to work" after having earlier thrown a spring at Mr. Host, is clearly indicative of a conclusion that even if Jones had been an aggressor or participant in horseplay, he had withdrawn from that aggression or participation. Thus, the Board was entitled to conclude as they must have, that Jones, like the claimant in *Woodland Cemetery Ass'n v. Graham* [149 Ind. App. 431, 435, 273 N.E.2d 546, 549 (1971)] had become "an innocent victim."

³³371 N.E.2d at 391.

³⁴378 N.E.2d at 858 (Pivarnik J., dissenting).

³⁵*Id.*

³⁶The dissent stated that willing participants in horseplay activity are not acting within the course of employment as defined by the Workmen's Compensation Act. It determined that the conduct leading up to the worker's injury could be "characterized

This approach seems analogous to those tort cases which hold a defendant liable for the reasonably foreseeable class of injuries which are likely to result and which flow from the defendant's original conduct.³⁷ The dissent failed, however, to enunciate the degree of abandonment or the criteria which the industrial board should use in determining whether an employee has in fact abandoned horseplay activity.

B. Workmen's Compensation—An Exclusive Remedy

1. *Parking Lot Accidents.*—In *Ward v. Tillman*,³⁸ Ward was injured in an automobile accident involving a fellow employee on the parking lot of his employer. Ward had "clocked out" and was leaving the plant as Tillman was entering. Ward and his wife brought an action against Tillman for injuries sustained by Ward. The trial court granted Tillman's motion for summary judgment. It determined that the accident arose out of and in the course of employment and that the Wards' exclusive remedy was under the Workmen's Compensation Act.

In affirming the trial court's determination, the court of appeals stated that "an employer may be liable for those injuries which occur off the immediate job site if the property is maintained for an employment-connected use."³⁹ If the parking lot is within the employer's supervision, it is an extension of his operating premises and, therefore, accidents which result from a reasonable ingress or egress to the plant generally are held to be employment-related risks.⁴⁰ Furthermore, since the accident occurred at a location where the employee by reason of his employment was reasonably expected to be, it was compensable.⁴¹

The court also determined that Ward and Tillman were co-employees, stating that employees are "in the same employ" if each

as a 'playful diversion,' 'a prank,' and a 'recognized human frailty.'" *Id.* The dissent concluded that the majority holding that the worker had "withdrawn from that aggression or participation" was a "judicial gloss on 'horseplay' [which is] an act of social policy beyond the intent of our legislature." *Id.*

³⁷See, e.g., *Seaton v. United States Rubber Co.*, 223 Ind. 404, 61 N.E.2d 177 (1945).

³⁸386 N.E.2d 1003 (Ind. Ct. App. 1979).

³⁹*Id.* at 1005. The court noted that public policy requires a liberal construction of arising out of and in the course of employment when determining whether an accident, involving the ingress and egress of an employee to his work premises, is compensable under the Workmen's Compensation Act (citing *O'Dell v. State Farm Mut. Auto. Ins. Co.*, 362 N.E.2d 862 (Ind. Ct. App. 1977)).

⁴⁰386 N.E.2d at 1005.

⁴¹*Id.* See *United States Steel Corp. v. Cicilian*, 133 Ind. App. 249, 180 N.E.2d 381 (1962).

employee would be entitled to compensation benefits for injuries sustained in the same accident.⁴² Because the court concluded that Tillman could have obtained compensation for any injuries which he might have sustained in the accident, it held that he was a co-employee, and not a third-party tortfeasor. The Wards' exclusive remedy was, therefore, under the Workmen's Compensation Act.⁴³

2. *Municipal Police Officers.*—In *Elwell v. City of Michigan City*,⁴⁴ a police officer and his wife brought an action against Michigan City alleging negligence in the maintenance of a sewer drain. Elwell was injured in the performance of his duties while riding in a police car. The trial court dismissed the action finding that the Workmen's Compensation Act and the Police Pension Fund Act⁴⁵ provided the exclusive remedy to policemen injured while on duty.

The Indiana Court of Appeals reversed the trial court and held that the Elwells' action was not barred.⁴⁶ It determined that although section 22-3-2-6 of the Indiana Code provides the exclusive remedy for industrial accidents,⁴⁷ the statute expressly exempts police officers who are members of the police department of a municipality *and* who are members of a police pension fund (hereinafter referred to as exempt officers).⁴⁸ The court further determined that if a municipality elects to procure workmen's compensation insurance, only the medical provisions of the Act apply to exempt officers.⁴⁹ Policemen covered by these medical provisions are limited to recovering medical and surgical care, medicines, laboratory costs, curative and palliative agents, x-ray costs, and costs for diagnostic and therapeutic services, to the extent that these services are provided for in the workmen's compensation policy procured by the municipality.⁵⁰ The court also held that the Workmen's Compensation Act was silent as to an officer's remedy other than for medical care and, thus, only barred recovery for

⁴²386 N.E.2d at 1005. IND. CODE § 22-3-2-13 (Supp. 1979) provides in part: Whenever an injury or death, for which compensation is payable under chapters 2 through 6 of this article shall have been sustained under circumstances creating in some other person than the employer and not in the same employ a legal liability to pay damages in respect thereto, the injured employee, or his dependents, in case of death, may commence legal proceedings against the other person to recover damages.

⁴³386 N.E.2d at 1005. See IND. CODE § 22-3-2-6 (1976), *quoted at note 7 supra*.

⁴⁴385 N.E.2d 1203 (Ind. Ct. App. 1979).

⁴⁵IND. CODE § 19-1-24-1 to -6 (1976).

⁴⁶385 N.E.2d at 1205.

⁴⁷See IND. CODE § 22-3-2-6 (1976), *quoted at note 7 supra*.

⁴⁸*Id.* at 1204.

⁴⁹*Id.* See IND. CODE § 22-3-2-2 (1976).

⁵⁰See IND. CODE § 22-3-2-2 (1976).

medical expenses and did not bar the Elwells' civil action for injuries.⁵¹

3. *Liability of the Company Physician.*—The “in the same employ”⁵² language received a limiting construction in one of the most significant departures from Indiana's traditional rejection of the dual capacity doctrine⁵³ in *Ross v. Schubert*,⁵⁴ which involved an appeal from an adverse judgment in a malpractice suit by an employee and his wife against three company physicians. Ross, partially disabled in a non-industry related accident, was examined by three physicians employed on a part-time basis at International Harvester's plant clinic. These physicians assigned the appellant to light duty work under a handicap job program. Subsequent to this assignment, Ross was again examined by one of the defendant physicians and ordered to return to regular factory work with some weight-lifting limitations. As a result of this activity, Ross was permanently disabled, and he and his wife then brought an action against the physicians for negligence in reclassifying him and in treating his injury. The trial court instructed the jury that civil actions against co-employees are barred by the workmen's compensation act and that the verdict must be returned for the physicians should the jury find that they were employees of International Harvester at the time of their alleged negligence. The jury thereupon returned a verdict for the physicians.

The Indiana Court of Appeals reversed the trial court and held that a physician is not protected by the “in the same employ” language.⁵⁵ It found no legislative intent to shield company physicians from tort liability for their malpractice⁵⁶ and concluded that the physicians under these facts were not immune as co-employees.⁵⁷ The court recognized that liability flowed from the patient-physician

⁵¹385 N.E.2d at 1204-05.

⁵²IND. CODE § 22-3-2-13 (Supp. 1979).

⁵³See *Kottis v. United States Steel Corp.*, 543 F.2d 22 (7th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977); *Needham v. Fred's Frozen Foods, Inc.*, 359 N.E.2d 544 (Ind. Ct. App. 1977). See Note, *Dual Capacity Doctrine: Third Party Liability of Employer-Manufacturer in Products Liability Litigation*, 12 IND. L. REV. 553 (1979).

⁵⁴388 N.E.2d 623 (Ind. Ct. App. 1979).

⁵⁵*Id.* at 630. Cf. *Duprey v. Shane*, 39 Cal. 2d 781, 249 P.2d 8 (1952) (upholding a judgment in favor of injured employee against employer-physician for malpractice in treatment of industry-related injury); *Hoffman v. Rogers*, 22 Cal. App. 3d 655, 99 Cal. Rptr. 455 (1972) (holding company physician could be sued for alleged malpractice in treatment of employee's industrial-incurred injury); *Seaton v. United States Rubber Co.*, 223 Ind. 404, 61 N.E.2d 177 (1945) (holding company physicians liable for malpractice and as third parties under the Workmen's Compensation Act). See generally 2A A. LARSON, *supra* note 3, §§ 72.61, .80 (1976).

⁵⁶388 N.E.2d at 626.

⁵⁷*Id.* at 630.

relationship, not from the employer-employee *quid pro quo*—immunity from suit for acknowledgment of liability, which is the basis for compensation under the workmen's compensation scheme.⁵⁸

The court relied upon a prior Indiana case, *Seaton v. United States Rubber Co.*,⁵⁹ to support its holding that company physicians are third parties, and not employees, as defined by the Workmen's Compensation Act,⁶⁰ rejecting the argument that *Seaton* was inapplicable because it predated the extension of immunity to co-employees.⁶¹ The *Ross* court determined that the physicians were independent contractors⁶² because the employer was precluded by medical practice from control over the manner in which the company physicians administered treatment to Ross.⁶³ The professional status and concomitant discretion in administering medical treatment forced a conclusion that the physicians' liability flowed from a capacity outside the employment relationship which the Workmen's Compensation Act was not designed to regulate.⁶⁴ Treatment occurring on the company premises by physicians paid by the same employer as Ross, did not mandate a different result.⁶⁵ The court's opinion also reflected a strong policy favoring medical competency and a fear that if physicians were permitted to avail themselves of the co-employee immunity that it might "induce industry [employing physicians] to encourage quackery, and place a premium upon negligence, inefficiency and wanton disregard of the professional obligations of medical departments of industry, toward the artisan."⁶⁶

C. Evidence

1. *The Residuum Rule.*—In *C.T.S. Corp. v. Schoulton*,⁶⁷ an age-old battle was renewed during the survey period concerning the use of hearsay evidence in administrative agency proceedings.⁶⁸

⁵⁸*Id.* at 629. See Note, *The Malpractice Liability of Company Physicians*, 53 IND. L.J. 585 (1978).

⁵⁹223 Ind. 404, 61 N.E.2d 177 (1945).

⁶⁰*Id.* at 414, 61 N.E.2d at 181.

⁶¹388 N.E.2d at 628.

⁶²*Id.* at 629.

⁶³*Id.* (citing *Itterman v. Baker*, 214 Ind. 308, 316-17, 15 N.E.2d 365, 370 (1938)).

⁶⁴388 N.E.2d at 629.

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷383 N.E.2d 293 (Ind. 1978). See also Greenberg, *Administrative Law*, 1979 *Survey of Indiana Law*, 13 IND. L. REV. 39, 42-45 (1980); Karlson, *Evidence*, 1979 *Survey of Indiana Law*, 13 IND. L. REV. 257, 260-64 (1980).

⁶⁸See generally K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 14.07-.09 (3rd ed. 1972); 3 A. LARSON, *supra* note 3, § 79.22 (1976); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 350-352 (E. Cleary ed. 1972); B. SMALL, *supra* note 3, § 12.6 (1950 & Supp.

Schoulton died of acute liver and kidney failure, and the industrial board determined that the cause was the inhalation of toxic fumes from a cleaning solvent, trichlorethylene, allegedly spilled and cleaned up by Schoulton at work. This finding was based solely upon the testimony of the deceased worker's family physician that Schoulton had told him "he had tripped over a barrel or bucket of cleaning solvent and that it spilled all over the floor and that he got down and cleaned it up."⁶⁹ The industrial board found the evidence sufficient to award compensation.

The Indiana Court of Appeals affirmed the board's ruling⁷⁰ and held that even though the statement in question did not fall within a traditionally recognized exception to the hearsay rule, it could nevertheless be considered as the basis for an award because the evidence was both necessary and trustworthy.⁷¹

The Indiana Supreme Court, in a three-two decision, granted transfer and vacated the holding that hearsay evidence could alone support an industrial board award of compensation,⁷¹ thus adopting a modified version of the residuum rule.⁷² The residuum rule, as adopted in several jurisdictions, permits an administrative agency to admit hearsay evidence, but requires an additional residuum of competent evidence to support an award of compensation as a matter of law.⁷³ Competent evidence refers to evidence which is admissible in a judicial proceeding and generally includes hearsay which is admitted without objection or pursuant to a recognized exception to the hearsay rule.⁷⁴

The modified rule adopted by the supreme court can be divided into four parts: (1) the industrial board is not held to the strict rules of evidence applicable in judicial proceedings⁷⁵ and, therefore, the

1976); Cohen, *Hearsay Evidence in Workers' Compensation Adjudications: The Forgotten Standard*, 27 F.I.C.Q. 392 (1977); Cooper, *The Admissibility of Hearsay in Hearings Before Workmen's Compensation Commissions*, 31 DICTA 423 (1954); Davis, *The Residuum Rule in Administrative Law*, 28 ROCKY MTN. L. REV. 1 (1955); Note, *The Weight to be Given Hearsay Evidence By Administrative Agencies: The "Legal Residuum" Rule*, 26 BROOKLYN L. REV. 265 (1960); Note, *The Sufficiency of Uncorroborated Hearsay In Administrative Proceedings: The California Rule*, 8 LOY. L.A.L. REV. 632 (1975); Note, *The Residuum Rule and Appellate Fact Review: Marriage of Necessity*, 13 RUTGERS L. REV. 254 (1958); Annot., 36 A.L.R.3d 12, § 27 (1971).

⁶⁹383 N.E.2d at 294.

⁷⁰354 N.E.2d 324 (Ind. Ct. App. 1976).

⁷¹383 N.E.2d at 297.

⁷²*Id.* at 296.

⁷³*Id.* at 295. See Cohen *supra* note 68, at 396-97; Annot., *supra* note 68.

⁷⁴See 383 N.E.2d at 295-97; K. DAVIS, *supra* note 68, § 14.07; B. SMALL, *supra* note 3, § 12.6, at 388-89.

⁷⁵383 N.E.2d at 295. See *Harrison Steel Casting Co. v. Daniels*, 147 Ind. App. 666, 263 N.E.2d 288 (1970); IND. ADMIN. R. & REGS. § (22-3-4-6)-1 (1976), which provides *inter alia*:

The industrial board will not be bound by the usual common law or statutory

admission of hearsay will not alone mandate appellate reversal;⁷⁶ (2) hearsay is considered improper and no authority requires the board to admit it;⁷⁷ (3) if hearsay is admitted without objection by the opposing party, or pursuant to a recognized exception to the hearsay rule, it can form the sole basis for an award of compensation;⁷⁸ (4) if, however, proper objection is raised, then the hearsay will not support an award of compensation without a residuum of competent evidence.⁷⁹ The primary distinction between Indiana's rule and the rule of other jurisdictions is that hearsay is considered improper evidence in Indiana. Therefore, within the board's discretion, hearsay evidence can be admitted but cannot form the basis of an award unless supported by a residuum of competence evidence.

There are several criticisms⁸⁰ of the residuum rule which are answered in the court's opinion. First, critics argue that the industrial board is an administrative agency and its proceedings are inherently dissimilar to those of a trial court.⁸¹ They point out that in workmen's compensation proceedings the legislature has defined the issues—the primary issue being a determination of whether the accident arose out of and in the course of employment, in contrast to judicial proceedings in which the parties define the issues.⁸² Second, whereas an industrial board consists of experienced specialists, a judicial proceeding is designed to have a neutral and uninformed trier of fact.⁸³ Finally, whereas the workmen's compensation scheme contemplates a continuing process of dispute settlement, a judicial

rules of pleading and evidence, or by any technical rules of practice in conducting hearings, but will conduct such hearings and make such investigations in reference to the questions at issue in such manner as in its judgment are best adapted to ascertain and determine expeditiously and accurately the substantial rights of the parties and to carry out justly the spirit of "The Indiana Workmen's Compensation Act."

⁷⁶The court adopted the dissenting opinion of Judge Buchanan of the court of appeals to the effect that "[t]he Board can admit all hearsay evidence without fear of automatic reversal. [However, if] properly objected to at the hearing and preserved on review and not falling within a recognized exception to the Hearsay Rule, then an award may not be based solely upon such hearsay.'" 383 N.E.2d at 296 (quoting 354 N.E.2d at 332 (Buchanan J., dissenting)). See *United Paperboard Co. v. Lewis*, 65 Ind. App. 356, 117 N.E. 276 (1917).

⁷⁷383 N.E.2d at 295; *Bohn Aluminum & Brass Co. v. Kinney*, 161 Ind. App. 128, 314 N.E.2d 780 (1974); B. SMALL, *supra* note 3, § 12.6, at 388-89.

⁷⁸383 N.E.2d at 296. See *Page v. Board of Comm'rs*, 155 Ind. App. 215, 292 N.E.2d 254 (1973).

⁷⁹383 N.E.2d at 295.

⁸⁰In addition to the three major criticisms which are discussed in the textual portion of this article, Professor Davis has set forth other common criticisms to the residuum rule. See K. DAVIS, *supra* note 68, § 14.07-.09.

⁸¹Cohen, *supra* note 68, at 394-95.

⁸²*Id.*

⁸³*Id.*

proceeding contemplates a one time dispute settlement process.⁸⁴ Although these distinctions are theoretically sound, each workmen's compensation case deals with a specific factual determination which is much narrower than the broad issues defined by the legislature. Furthermore, even though board members are experts who deal with workmen's compensation issues on a regular basis, there is no rational basis for ignoring the lessons taught in judicial proceedings that hearsay is often unreliable and any trier of fact, whether a trial judge who is trained not to be influenced by hearsay, juror or administrative board member, is susceptible to the influence of hearsay evidence.⁸⁵ Justice Prentice's majority opinion emphasized this point:

There simply is no logic to bestowing upon administrative agencies the unrestricted right to ignore the hearsay rule—a right for good reasons denied to juries and trial judges as fact finders There is no basis, however, for suggesting, as opponents of the rule appear to do, that administrative agency fact finders are more perceptive of truth, than are judges and juries, or that they are more likely to find the truth when left to their own devices than when operating under time tested and honored rules of evidence.⁸⁶

The majority noted four reasons why hearsay evidence is inherently suspect: (1) generally, the out-of-court assertion is not made under oath; (2) the demeanor and credibility of the declarant cannot be observed; (3) the likelihood of inaccuracy or fraud is great; and (4) there is no opportunity for the opposing party to cross-examine the declarant.⁸⁷ The residuum rule does not prevent an industrial board from considering hearsay evidence, but merely puts an outer limit on the use of that evidence in the final determination of rights under the Workmen's Compensation Act.

Next, critics of the rule argue that any prejudicial effect of the hearsay can be ameliorated by judicial review as to whether the hearsay was necessary and trustworthy.⁸⁸ The suggestion has also

⁸⁴*Id.*

⁸⁵*But see* 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 4b, at 36-43 (1940) [hereinafter cited as WIGMORE].

⁸⁶383 N.E.2d at 296.

⁸⁷*Id.*

⁸⁸K. DAVIS, *supra* note 68, § 14.07, at 278, elaborates on this position as follows:

The first and most important step in understanding the residuum rule—a step that too many courts have failed to take—is to recognize what is and what is not the alternative to the residuum rule. The alternative is to allow agencies and reviewing courts to exercise discretion in determining in the light of circumstances of each case whether or not particular evidence is

been made that if it is unclear upon which evidence the board's ruling was based, the court can remand the case to the board with directions to explain more fully the basis of its award.⁸⁹ There are two problems with this approach. First, the appellate court would be required to probe into the necessity and trustworthiness of the hearsay. The appellate courts in Indiana have traditionally refused to weigh the evidence or determine the credibility of witnesses, limiting review to a determination of whether the record supports the ruling as a matter of law.⁹⁰ In *Schoulton*, the majority stated:

Opponents of the rule are quick to point out that rejection of the rule does not require a reviewing court to accept a finding based upon incompetent evidence but only that it may accept it or not, according to its own determination of whether the supporting evidence was reliable and substantial. Such a viewpoint is not compatible with our established rule of appellate review against determining the weight of the evidence and the credibility of witnesses.⁹¹

Second, it can be argued that a remand to the board for clarification would create unnecessary delay for the worker or his family in receiving compensation. Therefore, a major purpose of the Workmen's Compensation Act—to provide a guaranteed and expeditious remedy for industrial accidents—would be defeated.⁹²

Finally, opponents of the residuum rule argue that there is a fallacy in equating legally competent evidence with trustworthy evidence while ignoring the possibility that hearsay evidence might be equally probative and trustworthy.⁹³ The Indiana courts have recognized, however, that the board's fact-finding process should not be hampered by the procedural and evidentiary technicalities used

reliable even though it would be excluded in a jury case. In the exercise of such discretion, agencies and reviewing courts will in many circumstances find that particular hearsay or other so-called incompetent evidence has insufficient reliability. Rejection of the residuum rule does not mean that an agency is compelled to rely upon incompetent evidence, it means only that the agency and the reviewing court are free to rely upon the evidence if in the circumstances they believe that the evidence should be relied upon. Rejection of the residuum rules does not mean that a reviewing court must refuse to set aside a finding based upon incompetent evidence; it means only that the court may set aside the finding or refuse to do so as it sees fit, in accordance with its own determination of the question whether the evidence supporting the finding should be deemed reliable and substantial in the circumstances.

⁸⁹See Cohen, *supra* note 68, at 397-98.

⁹⁰383 N.E.2d 296. See B. SMALL, *supra* note 3, § 12.14 (1950 & Supp. 1976).

⁹¹383 N.E.2d at 296.

⁹²Malton v. Malton, 92 Ind. App. 698, 133 N.E.2d 369 (1931). See generally B. SMALL, *supra* note 3, § 12.7 (1950 & Supp. 1976).

⁹³See 1 WIGMORE, *supra* note 85, at 41-42.

in courts of law.⁹⁴ The board is vested with the discretion to admit reliable hearsay, even over an objection thereto, and consider this evidence in formulating its determination.⁹⁵ The wide discretion vested in the board is a recognition of the board's expertise, the necessity for an informal fact-gathering process, and a recognition that hearsay may be reliable and helpful in a determination of the cause of an industrial accident.⁹⁶

Thus, the residuum rule merely imposes a threshold safety mechanism to guard against cases in which the hearsay is not otherwise supported. The rule also prevents the appellate courts from becoming a "super industrial board," forced to weigh the evidence and determine its credibility before it can perform its traditional appellate function of determining whether the award is supported by sufficient evidence as a matter of law. Clearly, the debate concerning the residuum rule will continue, but, as modified, it is the rule in Indiana.

2. *Expert Testimony.*—In *Pike County Highway v. Fowler*,⁹⁷ the Indiana Court of Appeals decided that, in determining the cause of an injury, the industrial board may consider a physician's opinion based upon personal knowledge and another physician's deposition, even though the physician fails to specify the facts in the deposition upon which he relied. Fowler was an employee of the Pike County Highway Department and was injured when a 250 to 300 pound wooden plank was dropped on his foot. Fowler sought medical treatment from his family physician who diagnosed severe vascular damage and referred him to an orthopedic surgeon who in turn referred Fowler to a general surgeon with experience in vascular surgery. Fowler was last examined by his family physician on July 11, 1975, before Fowler consulted the general surgeon on the same day. After several operations, the general surgeon amputated Fowler's foot and lower leg due to a gangrenous condition on December 30, 1975.

At the industrial board hearing, the family physician testified that he had been Fowler's physician for approximately twenty-five years and that he had never known Fowler to be seriously ill or to have had any circulatory problems prior to the injury to his foot. The physician, relying upon unspecified parts of the general surgeon's deposition, concluded that Fowler's injury was caused by the plank. The board awarded compensation to Fowler.

⁹⁴383 N.E.2d 296; *Harrison Steel Castings Co. v. Daniels*, 147 Ind. App. 666, 263 N.E.2d 288 (1970).

⁹⁵383 N.E.2d at 296.

⁹⁶*Id.* See B. SMALL, *supra* note 3, § 12.6 (1950 & Supp. 1976).

⁹⁷388 N.E.2d 630 (Ind. Ct. App. 1979).

The court of appeals held that there was no error in admitting the expert's opinion as to the cause of injury.⁹⁸ The family physician's firsthand knowledge of Fowler's medical history combined with the fact that the general surgeon, whose deposition had been relied upon, had reached a contrary conclusion as to the cause of Fowler's injury, supported the board's reliance upon the expert's opinion that Fowler's injury was caused by the industrial accident.⁹⁹ The court concluded that the expert's failure to specify what facts in the deposition were being relied upon did not change this result.¹⁰⁰ The court also noted three factors relating to this issue: (1) the family physician had firsthand knowledge of Fowler's condition and medical history and, therefore, did not have to base his opinion upon a hypothetical question;¹⁰¹ (2) a physician may give an opinion as to the probable cause of injury even though he has not continuously attended the patient; and (3) the strict rules of evidence do not apply to industrial board proceedings, and the board committed no reversible error in admitting the expert's opinion even if an irregularity did exist in the manner in which the opinion was presented.¹⁰²

D. Rights of a Posthumous Unacknowledged Illegitimate Child

During the survey period, section 22-3-3-19 of the Indiana Code¹⁰³ came under constitutional attack. Under the Workmen's Compensation Act, "presumptive dependents" have a favored compensation status.¹⁰⁴ Section 22-3-3-19 defines certain classes of dependents as

⁹⁸*Id.* at 638.

⁹⁹*Id.* at 635.

¹⁰⁰The court found that except for the expert's subsequent explanation of the theory upon which he based his opinion and his admission that he had considered the other physician's deposition, he had otherwise laid a thorough factual foundation for his opinion. *Id.*

¹⁰¹The court stated the general rule applicable in judicial proceedings to be: "An expert witness speaking from personal observation need not be asked a hypothetical question prior to giving his opinion. *Murphy Auto Sales, Inc. v. Coomer*, 123 Ind. App. 709, 112 N.E.2d 589 (1953). Instead, he may express his opinion after stating the facts of which he has personal knowledge and upon which he is basing his opinion." 388 N.E.2d at 635.

¹⁰²388 N.E.2d at 635.

¹⁰³IND. CODE § 22-3-3-19 (Supp. 1979).

¹⁰⁴*Id.* § 22-3-3-18 (1976) provides:

Dependents under this act . . . shall consist of three (3) classes, viz. (1) presumptive dependents, (2) total dependents in fact, and (3) partial dependents in fact. Presumptive dependents shall be entitled to compensation to the complete exclusion of total dependents in fact and partial dependents in fact and shall be entitled to such compensation in equal shares.

Id. § 22-3-3-19 (Supp. 1979) states *inter alia*:

The following persons are conclusively presumed to be wholly dependent for support upon a deceased employee and shall constitute the class

presumptive dependents, one of which is acknowledged illegitimate children. This section does not, however, define any class which would include unacknowledged illegitimate children. The discrimination between these two classes formed the basis of an equal protection challenge to the section. In *Anonymous Child v. Deceased Father's Employer*,¹⁰⁵ the Indiana Court of Appeals held this section to be unconstitutional and reversed an industrial board denial of compensation to a posthumous unacknowledged illegitimate child whose father had been killed in an industrial accident.¹⁰⁶

The industrial board found that the deceased worker and natural mother had known each other for four months prior to his death; that they had planned to marry and were to obtain a marriage license the week in which the decedent was killed; that they were neither living together nor had the decedent contributed to her support; that they had commenced sexual relations about one month prior to his death and she had not had sexual relations with any other men during that period; and that the child was born approximately eight months after the decedent's death.¹⁰⁷

The board determined that the child was in fact the child of the deceased worker, but denied compensation because the father had failed to acknowledge the child before his death.¹⁰⁸ The court of appeals found that this section, making compensation dependent upon the decedent's acknowledgment, was an unconstitutional violation of the equal protection of the law by discriminating against the class of posthumous illegitimate children.¹⁰⁹

The Indiana Supreme Court granted transfer and vacated the opinion of the court of appeals¹¹⁰ in *Bernacki v. Superior Construction Co.*,¹¹¹ upholding the constitutionality of section 22-3-3-19 upon a

known as presumptive dependents in section 18 of this chapter:

....

(d) An unmarried child under eighteen (18) years upon the parent with whom he or she may not be living at the time of the death of such parent, but upon whom, at such time, the laws of the state impose the obligation to support such child.

....

As used in . . . this section, the term "child" shall include stepchildren, legally adopted children, posthumous children and acknowledged illegitimate children.

¹⁰⁵377 N.E.2d 407 (Ind. Ct. App. 1978), *vacated sub nom.* *Bernacki v. Superior Constr. Co.*, 388 N.E.2d 536 (Ind. 1979).

¹⁰⁶377 N.E.2d at 413.

¹⁰⁷*Id.* at 408.

¹⁰⁸*Id.*

¹⁰⁹*Id.* at 411. In this determination, the court of appeals relied solely upon *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

¹¹⁰377 N.E.2d 407 (Ind. Ct. App. 1978).

¹¹¹388 N.E.2d 536 (Ind. 1979).

finding that the state's interest in decreasing the problems associated with locating illegitimate children and in determining questionable claims of parenthood justified disfavored treatment of posthumous unacknowledged illegitimate children.¹¹² The supreme court stated:

It has been urged that, because of the alleged father's untimely death, he had no opportunity to acknowledge the child. We hasten to add that neither did he have an opportunity to deny it. To declare unconstitutional the acknowledgment requirement of the Act would not only create a class of recipients never contemplated by the Legislature, it would open wide the door to posthumous claims of paternity impossible of defense.¹¹³

E. Right to Compensation Under the Act

1. *Double Compensation and Prohibited Occupations.*—In *Franklin Flying Field v. Morefiled*,¹¹⁴ a sixteen year old employee was injured while operating a bushog mower which ran over his leg and resulted in 100 percent permanent partial impairment.¹¹⁵ The industrial board found that the employer had violated provisions of the Child Labor Laws limiting the length of work periods and requiring an employment certificate.¹¹⁶ It further determined that the operation of a bushog mower was a prohibited hazardous occupation under the Child Labor Laws.¹¹⁷ Based upon these violations, the board entered an award of double compensation.¹¹⁸ Although it is unclear whether the double compensation award was based upon the violation of the Child Labor Laws, it is certain that the award was based, in part, upon the prohibited occupation statute.

¹¹²*Id.* at 539.

¹¹³*Id.*

¹¹⁴375 N.E.2d 249 (Ind. Ct. App. 1978).

¹¹⁵*Id.* at 250 (injury not in issue).

¹¹⁶*Id.* at 250-51. See IND. CODE §§ 20-8.1-4-1 to -31 (1976 & Supp. 1979).

¹¹⁷IND. CODE § 20-8.1-4-24 (1976) specifies the prohibited occupations applicable to children under the age of 17.

¹¹⁸*Id.* § 22-3-6-1 (Supp. 1979) permits an award of double compensation if, the employee is a minor who, at the time of the accident, is employed, required, suffered or permitted to work in violation of the child labor laws of this state, the amount of compensation and death benefits, as provided in [this act], shall be double the amount which would otherwise be recoverable. The insurance carrier shall be liable on its policy for one half (1/2) of the compensation or benefits that may be payable on account of the injury or death of such a minor, and the employer shall be wholly liable for the other one half (1/2) of such compensation or benefits.

The Indiana Court of Appeals reversed the board's award of double compensation.¹¹⁹ The court held that an employee is entitled to double compensation for violation of the Child Labor Laws only when the employee is under the age of sixteen.¹²⁰ If the employee is between the ages of sixteen and seventeen, double compensation can be awarded only if the injury resulted directly from a prohibited occupation.¹²¹ In *Wynkoop v. Superior Coal Co.*,¹²² cited in *Franklin*,¹²³ the court stated: "If a minor has reached the age of sixteen (16) years and is not employed, suffered or permitted to work at any occupation prohibited by law, he is not entitled to double compensation even though some other provision of the Child Labor Laws has been violated."¹²⁴ Strictly construing the prohibited occupation statute, the *Franklin* court held that the operation of a bushhog mower was not a prohibited occupation¹²⁵ and reversed the board award as being contrary to law.¹²⁶

2. *Amendment of the Award Provision.*—Section 22-3-3-27 of the Indiana Code¹²⁷ provides a general two-year statute of limitation for modification of original compensation awards, "except that applications for increased permanent partial impairment are barred unless filed within one (1) year from the last day for which compensation was paid."¹²⁸ In *Gibson v. Industrial Board*,¹²⁹ the Indiana Court of Appeals upheld the constitutionality of the one-year limitation imposed by this section.¹³⁰

The appellant was injured in an industrial accident on October 3, 1969. The appellant and her employer agreed that the extent of impairment was equivalent to six weeks of pay, and the industrial board approved this agreement on June 21, 1971. The appellant petitioned for a modification of the award on May 26, 1972. The issue

¹¹⁹375 N.E.2d at 252.

¹²⁰*Id.* at 250 n.1.

¹²¹*Id.* at 250.

¹²²116 Ind. App. 237, 63 N.E.2d 305 (1945).

¹²³375 N.E.2d at 250.

¹²⁴116 Ind. App. at 239, 63 N.E.2d at 306.

¹²⁵375 N.E.2d at 252.

¹²⁶*Id.* Because one purpose of the double compensation provision is to penalize an employer who subjects a child to unauthorized child labor practices and not necessarily to compensate the child for injuries sustained, the court's holding evidences an adherence to the traditional rule that penal statutes are to be strictly construed. *City of Fort Wayne v. Bishop*, 228 Ind. 304, 92 N.E.2d 544 (1950). Furthermore, the court suggested that the board may not have the authority to interpret the statute to determine if an occupation is hazardous, but may be limited to a strict application of the categories of prohibited conduct defined by statute. 375 N.E.2d at 251 n.3.

¹²⁷IND. CODE § 22-3-3-27 (1976).

¹²⁸*Id.* See B. SMALL, *supra* note 3, § 12.9, at 403.

¹²⁹376 N.E.2d 502 (Ind. Ct. App. 1978).

¹³⁰*Id.* at 505.

before the board was whether the one-year statute of limitations began to run on December 17, 1969, the last day for which compensation was made, or whether it began to run after the board's award was made final on June 21, 1971. The board concluded that the one-year period commenced on December 17, 1969, and that it had no jurisdiction to consider the appellant's petition for modification.

The court of appeals affirmed the board, strictly construing section 22-3-3-27 to mean that modifications must be sought within one year from the last day for which compensation was made, and rejected the date of injury, the date of the board's final award, and the date of last payment, stating that the application had to be filed "within one year from the distal end of the compensation period fixed in previous awards."¹³¹

The court also rejected the appellant's due process challenge to the statute.¹³² Although the parties did not agree on the extent of impairment until approximately six months after the one-year limitation had run,¹³³ the appellant's opportunity to assert her full claim of injury before the board's final award was held by the court to satisfy the "meaningful opportunity to be heard" requirement of due process.¹³⁴ The court further held that the appellant was not deprived of equal protection of the law because the one-year limitation was a reasonable vehicle for carrying out the state's interest in finality of claims before the board.¹³⁵

An attempt by the industrial board to limit an employer's liability for medical expenses relating to permanent partial impairment was rejected by the Indiana Court of Appeals in *Gregg v. Sun Oil Co.*¹³⁶ The court construed the one-year limitation of section 22-3-3-27 to include medical expenses relating to permanent partial impairment.¹³⁷

¹³¹*Id.* at 504.

¹³²*Id.*

¹³³*Id.* at 506 (facts cited in Garrard, J., concurring opinion).

¹³⁴*Id.* at 504.

¹³⁵*Id.* at 505.

¹³⁶388 N.E.2d 588 (Ind. Ct. App. 1979).

¹³⁷*Id.* at 589-90. Medical expenses are governed by IND. CODE § 22-3-3-4 (Supp. 1979), which provides in part:

If after an employee's injury has been adjudicated by agreement or award on the basis of permanent partial impairment and within the statutory period for review in such case as provided in [*id.* § 22-3-3-27 (1976)], the employer may continue to furnish a physician or surgeon and other medical services and supplies and the industrial board may within such statutory period for review as provided in [*id.* § 22-3-3-27], on a proper application of either party, require that treatment by such physician and other medical services and supplies be furnished by and on behalf of the employer as the industrial board may deem necessary to limit or reduce the amount and extent of such impairment.

It determined that this section was not intended to limit the length of time for which the board may award continuing medical expenses incurred by an employee subsequent to a work-related injury, but merely delineated a time frame within which applications for the award of medical expenses must be filed.¹³⁸ The court stated that as long as the petition for modification was filed within one year from the date of last payment under the award, whether that payment was part of the original or a subsequent modification of the award, the board had jurisdiction to consider the employee's claim for additional compensation.¹³⁹ The court recognized that an employer could be liable for the cost of injury-related medical expenses during the entire life of the worker.¹⁴⁰ Section 22-3-3-4¹⁴¹ was held to impose the only limitation on the board's power to grant a modification once the board had been vested with jurisdiction by the claimant's compliance with the one-year limitation of section 22-3-3-27.¹⁴² Section 22-3-3-4 of the Indiana Code states *inter alia* that the board has the discretion to award continuing medical expenses for that period of time which it deems "necessary to limit or reduce the amount and extent of such impairment."¹⁴³

F. Statutory Amendments

1. "Employee" Under the Act.—Section 19-1-40-1 of the Indiana Code,¹⁴⁴ which defined a "volunteer fireman," was amended¹⁴⁵ to specifically exclude volunteer firemen from the definition of "employee" under both the Indiana Workmen's Compensation Act¹⁴⁶ and the Indiana Workmen's Occupational Disease Act.¹⁴⁷

Section 22-3-6-1 of the Indiana Code¹⁴⁸ was amended to allow an owner of a sole proprietorship or a partner of a partnership an election to include himself as an employee under the workmen's compensation act if actually engaged in his respective business. In order to make the election, written notice must be given to the individual's insurance carrier and the industrial board.¹⁴⁹ The election does not

¹³⁸388 N.E.2d at 590.

¹³⁹*Id.*

¹⁴⁰*Id.* at 591.

¹⁴¹IND. CODE § 22-3-3-4 (Supp. 1979).

¹⁴²388 N.E.2d at 591 n.6.

¹⁴³IND. CODE § 22-3-3-4 (Supp. 1979).

¹⁴⁴*Id.* § 19-1-40-1 (1976) (amended 1979).

¹⁴⁵Act of Apr. 9, 1979, Pub. L. No. 186, § 1, 1979 Ind. Acts 893.

¹⁴⁶IND. CODE §§ 22-3-2-1 to -6-3 (1976 & Supp. 1979).

¹⁴⁷*Id.* §§ 22-3-7-1 to -36.

¹⁴⁸*Id.* § 22-3-6-1 (1976) (amended 1979).

¹⁴⁹*Id.*

become effective, however, until actually received by these entities.¹⁵⁰

Sole proprietors and partners were given the same election to become employees under the occupational disease act by amendment to section 22-3-7-9 of the Indiana Code.¹⁵¹ The same election prerequisites were adopted as were adopted in the amendment to section 22-3-6-1 of the Indiana Code.¹⁵²

2. *Employer's Liability Under the Act.—a. Volunteer firemen.*—Section 19-1-40-7 of the Indiana Code¹⁵³ requires a municipality to procure compensation insurance for the benefit of its volunteer firemen. The statute was amended during the survey period to require a municipality which fails to procure the required insurance to pay any injured fireman an amount equal to that sum he could have received under the compensation policy.¹⁵⁴

b. *Medical care.*—In addition to artificial members and braces, section 22-3-3-4 of the Indiana Code¹⁵⁵ was amended to require an employer to furnish prosthodontics to an injured employee pending adjudication of his permanent impairment claim.¹⁵⁶

c. *Second injury fund.*—Section 22-3-3-13 of the Indiana Code¹⁵⁷ establishes a second injury fund to compensate employees who have sustained permanent and total impairment, but because part of that injury was caused by a prior injury, the employer is liable only for that portion of the impairment caused by the second employment-related injury. When the employer makes the payments required to compensate the worker for the second injury, the employer is discharged from liability. To the extent that the employee is still entitled to compensation for the remainder of his permanent impairment, he is compensated out of the "second injury" fund maintained by the state treasurer. The statute was amended to increase the amount an employer or his insurance carrier must pay into the fund

¹⁵⁰*Id.* § 22-3-6-1 (1976), as amended by Act of Apr. 4, 1979, Pub. L. No. 228, § 1, 1979 Ind. Acts 1038.

¹⁵¹IND. CODE § 22-3-7-9 (1976), as amended by Act of Apr. 4, 1979, Pub. L. No. 228, § 2, 1979 Ind. Acts 1041.

¹⁵²IND. CODE § 22-3-6-1 (1976 & Supp. 1979).

¹⁵³*Id.* § 19-1-40-7.

¹⁵⁴*Id.* § 19-1-40-7 (1976), as amended by Act of Apr. 9, 1979, Pub. L. No. 186, § 3, 1979 Ind. Acts 893.

¹⁵⁵IND. CODE § 22-3-3-4 (1976) (amended 1979).

¹⁵⁶*Id.* § 22-3-3-4 (1976), as amended by Act of Apr. 10, 1979, Pub. L. No. 227, § 1, 1979 Ind. Acts 1014. The amended version now reads: "Where a compensable injury results in the amputation of an arm, hand, leg or foot or the enucleation of an eye or the loss of natural teeth, or prosthodontics, the employer shall furnish an artificial member, proper braces, where required, and prosthodontics." (amended portion emphasized).

¹⁵⁷IND. CODE § 22-3-3-13 (1976) (amended 1979).

from $\frac{3}{4}\%$ to 1% of the total amount of all workmen's compensation paid to its employees or their beneficiaries for the "calendar year next preceding the due date of such payment."¹⁵⁸ Furthermore, under the old rule, if the fund maintained a minimum of \$300,000, the $\frac{3}{4}\%$ would not be collected during that period. The amendment increases the amount which must be kept in the fund, before the new 1% assessment will be collected, to a minimum of \$400,000.¹⁵⁹

3. *Compensation Schedules.*—*a. Volunteer firemen.*—Section 19-1-40-8 of the Indiana Code¹⁶⁰ defined the disability benefits a volunteer fireman was to receive. Under the old schedule, the fireman was entitled to a minimum weekly indemnity of \$50.¹⁶¹ The amended schedule provides for a minimum weekly indemnity for total disability of \$100 for a total of 260 weeks.¹⁶² The fireman is also entitled to a minimum of \$25,000 coverage for medical expenses.¹⁶³

Section 19-1-40-9 of the Indiana Code states that the insurance policy must provide a minimum coverage of \$40,000 to the volunteer fireman for total and permanent disability arising from a compensable accident.¹⁶⁴ The statute was amended to delete language which imposed a maximum aggregate amount for payment of \$40,000.¹⁶⁵

The statute was also amended to require each municipality to purchase a minimum of \$300,000 of insurance to cover the liability of its volunteer firemen for bodily injury or property damage caused by a fireman while acting within the scope of his duties at the scene of a fire or other emergency.¹⁶⁶ The statute also provides that "[t]he municipality *may* purchase a group insurance policy, or a separate policy for each fireman, whichever is of the lesser cost."¹⁶⁷

b. Schedule under Workmen's Compensation Act.—Section 22-3-3-2 of the Indiana Code¹⁶⁸ was amended to include the post-July 1, 1977, schedule for injuries resulting in temporary total, temporary

¹⁵⁸*Id.* § 22-3-3-13 (1976), as amended by Act of Apr. 10, 1979, Pub. L. No. 227, § 3, 1979 Ind. Acts 1014.

¹⁵⁹*Id.*

¹⁶⁰IND. CODE § 19-1-40-8 (1976) (amended 1979).

¹⁶¹*Id.*

¹⁶²*See id.* § 19-1-40-8 (1976), as amended by Act of Apr. 9, 1979, Pub. L. No. 186, § 4, 1979 Ind. Acts 893.

¹⁶³IND. CODE § 19-1-40-8 (Supp. 1979).

¹⁶⁴*Id.* § 19-1-40-9(a) (1976) (amended 1979).

¹⁶⁵*Id.* § 19-1-40-9(a) (1976), as amended by Act of Apr. 9, 1979, Pub. L. No. 186, § 5, 1979 Ind. Acts 893.

¹⁶⁶IND. CODE § 19-1-40-9(b) (1976), as amended by Act of Apr. 9, 1979, Pub. L. No. 186, § 5(b), 1979 Ind. Acts 893. The prior statute read that a municipality *may* purchase a minimum of \$300,000 insurance to cover the liabilities of its volunteer firemen. IND. CODE § 19-1-40-9(b) (1976) (amended 1979).

¹⁶⁷IND. CODE § 19-1-40-9(a) (1976), as amended by Act of Apr. 9, 1979, Pub. L. No. 186, § 5(b), 1979 Ind. Acts 893.

¹⁶⁸IND. CODE § 22-3-3-22 (Supp. 1979).

partial and total permanent disability.¹⁶⁹ With respect to injuries occurring on or after July 1, 1977, but before July 1, 1979, an employee is entitled to a minimum of \$75 and maximum of \$180 weekly compensation. For injury occurring between July 1, 1979 and July 1, 1980, the maximum is increased to \$195. In all cases, weekly compensation payments may not exceed the average weekly wage of the employee at the time of injury.¹⁷⁰

The statute was also amended¹⁷¹ to establish a maximum compensation, exclusive of medical benefits, which may be paid during the aforementioned periods. The maximum compensation which may be paid for injury occurring between July 1, 1979 and July 1, 1980, is \$65,000. With respect to injuries occurring beginning July 1, 1980, the maximum compensation is \$70,000.¹⁷²

c. *Schedule under Occupational Disease Act.*—Section 22-3-7-16 of the Indiana Code¹⁷³ was amended to include a schedule of benefits with respect to occupational diseases occurring on or after July 1, 1979. An employee is now entitled to receive in addition to disability benefits not exceeding fifty-two weeks, a weekly compensation of 60% of the employee's average weekly wage not to exceed \$125.¹⁷⁴

Section 22-3-7-19 of the Indiana Code¹⁷⁵ was amended to include the post-July 1, 1979 compensation schedule. An employee is entitled to receive a minimum of \$75 and maximum of \$195 weekly compensation for occupational diseases arising between July 1, 1979 and July 1, 1980. For diseases arising beginning July 1, 1980, an employee is entitled to receive a minimum of \$75 and maximum of \$210.¹⁷⁶ The statute was also amended to provide that the maximum compensation an employee may receive during the period of July 1, 1979 and July 1, 1980, is \$65,000.¹⁷⁷

¹⁶⁹*Id.* § 22-3-3-22(a), as amended by Act of Apr. 10, 1979, Pub. L. No. 227, § 4, 1979 Ind. Acts 1014.

¹⁷⁰IND. CODE § 22-3-3-22(a) (Supp. 1979).

¹⁷¹*Id.* § 22-3-3-22(b) (1976), as amended by Act of Apr. 10, 1979, Pub. L. No. 227, § 4, 1979 Ind. Acts 1014.

¹⁷²IND. CODE § 22-3-3-22(b) (Supp. 1979).

¹⁷³*Id.* § 22-3-7-16.

¹⁷⁴*Id.* § 22-3-7-16(d) (1976), as amended by Act of Apr. 10, 1979, Pub. L. No. 227, § 5, 1979 Ind. Acts 1014.

¹⁷⁵IND. CODE § 22-3-7-19 (Supp. 1979).

¹⁷⁶*Id.* § 22-3-7-19(a) (1976), as amended by Act of Apr. 10, 1979, Pub. L. No. 227, § 6, 1979 Ind. Acts 1014.

¹⁷⁷IND. CODE § 22-3-7-19(b) (1976), as amended by Act of Apr. 10, 1979, Pub. L. No. 227, § 6, 1979 Ind. Acts 1014.

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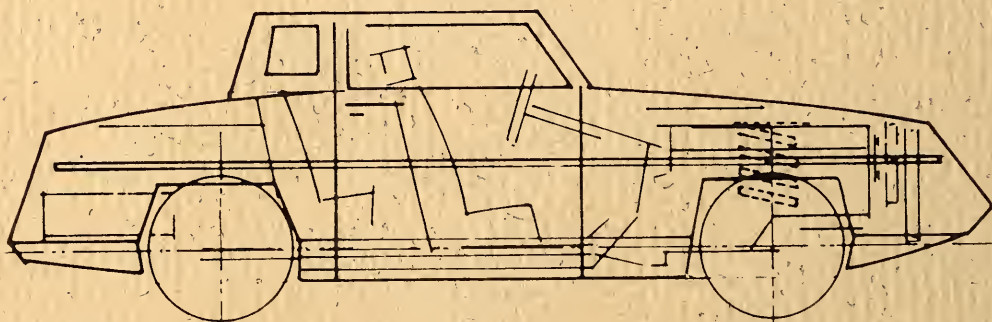


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